Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

DUWAMISH INDIAN TRIBE, SNOHOMISH INDIAN TRIBE and STEILACOOM INDIAN TRIBE,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil litigant entitled to post-judgment relief pursuant to Federal Rule of Civil Procedure 60(b)(6) when post-judgment evidence indicates that the litigant was denied its due process right to a fair trial because the judge, at the time he issued his opinion, was mentally incompetent.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the State of Washington, Nisqually Indian Tribe, Hoh Indian Tribe, Lummi Indian Nation, Skokomish Indian Tribe, Jamestown Band of Klallams, Lower Elwha Klallam Tribe, Port Gamble Band Clallum, Muckleshoot Indian Tribe, Quinault Indian Nation, Quileute Indian Tribe, Tulalip Tribe, Makah Indian Tribe, Suquamish Indian Tribe, Puyallup Tribe, Swinomish Indian Tribal Community, Nooksack Tribe and Upper Skagit Tribe, were parties before the court of appeals.

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Petitioners, the Duwamish, Snohomish, and Steilacoom Indian Tribes (the "Three Tribes"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Washington*, 98 F.3d 1159 (9th Cir. 1996) (App. A). The opinion of the district court in *United States v. Washington*, Civ. No. 9213-R, Subproceeding No. 93-2 (D. Wash. Jan. 23, 1995) is not published, but can be found at 1995 WL 911759 (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on October 23, 1996. The Court of Appeals denied a timely petition for rehearing on January 6, 1997 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Federal Rule of Civil Procedure 60(b)(6) provides:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's

> legal representatives from a final judgment, order, or proceeding for the following reasons: . . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The fundamental question in this case is whether a litigant is entitled to relief from a judgment if the district court judge lacked mental competence at the time he issued his decision. It arises in the context of the Three Tribes' motion under Fed. R. Civ. P. 60(b)(6) ("Rule 60(b)(6) Motion") to reopen a judgment that serves to permanently deprive them of important treaty rights (the "1979 Judgment") on the ground that the district court judge suffered from Alzheimer's disease at the time he issued the 1979 Judgment. To fully appreciate the significance of the issues presented by this case, it is essential to consider its lengthy procedural background.

A. Background of the 1979 Judgment.

In September, 1970, the United States instituted a suit, *United States v. Washington,* (Civ. No. 9213, W.D. Wash. 1970), on its own behalf and as trustee for several Indian tribes, to enforce the fishing rights of those tribes under a series of treaties often referred to as the "Stevens Treaties." In 1974, the presiding district court judge, the Honorable George Boldt, determined that each of the tribes in question was a political successor in interest to an aboriginal tribe which had entered into a treaty or treaties with the United States and was, therefore, a tribe entitled to fishing and other rights reserved to the tribes in those treaties. *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (1975), *cert. denied,* 423 U.S. 1086 (1976). As part of his decision, Judge Boldt extended treaty rights to two tribes, the Stillaguamish and Upper Skagit, even

though they had neither organized under the Indian Reorganization Act of 1934 nor been otherwise recognized by the federal government. *Id.* at 348-49, 378-79 (Findings of Fact and Conclusions of Law Nos. 1 and 144-48). The Court of Appeals affirmed this decision, stating that non-recognition of an Indian tribe by the federal government could have no effect upon the treaty rights of that Indian tribe. 520 F.2d at 692-93.

In 1974, the Three Tribes and two others, the Snoqualmie and Samish Indian Tribes (together, "the Intervening Tribes") intervened as plaintiffs in *United States v. Washington* to enforce their treaty rights. Judge Boldt referred the issue of their treaty tribe status to a magistrate on September 13, 1974. On March 5, 1975, the magistrate issued a report concluding that none of the Intervening Tribes qualified as a treaty tribe. Judge Boldt did not accept the magistrate's report, however, and he ordered a *de novo* evidentiary hearing on the matter in August 1975. Judge Boldt directed the parties to submit additional evidence and heard oral argument on the matter in January 1977.

In February 1978, Judge Boldt underwent surgery for an aortic aneurysm which required a lengthy period of convalescence. In February of 1979, Judge Boldt sent a letter to all counsel in *United States v. Washington* indicating that he had asked to be relieved of his judicial duties in the case. From the tone of his letter, it appeared that Judge Boldt had forgotten about the pending decision concerning the Intervening Tribes' treaty status and that he believed that all outstanding issues in the case had been resolved.[1] Although Judge Boldt did state that

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1. "The present status of the litigation, my health and the fact that we are between salmon seasons, have made me conclude that it is now in the best interests of all parties for this litigation to be reassigned. Accordingly, by separate communication to Chief Judge Walter T. McGovern, I have requested that I be relieved from further participation in *United States v. Washington*." Feb. 7, 1979 Letter from Judge George H. Boldt to all counsel, Master Docket 5595 1/2.

he wished to be relieved from his duties in the case, his letter gave no indication that he was physically or mentally unable to complete any matters that might be in front of him before he stopped work.

When Judge Boldt asked to be relieved of his duties in *United States v. Washington,* the question of the Intervening Tribes' treaty status had been pending for nearly five years. To avoid a further delay of several months, or perhaps longer, if the question were assigned to a new judge for determination, four of the Intervening Tribes, petitioned then-Chief Judge McGovern to allow Judge Boldt to resolve the question of the treaty tribe status of the Intervening Tribes. In the request, they emphasized that "[a]n overriding factor, of course, is the willingness and ability of Judge Boldt to take on this task." On March 14, 1979, Chief Judge McGovern granted the request and, noting Judge Boldt's willingness, allowed Judge Boldt to resolve the issue of the Intervening Tribes' status.

A little more than a week later, on March 23, 1979, Judge Boldt signed the 1979 Judgment, in which he held that the Intervening Tribes were not political successors in interest to the aboriginal tribes that had signed the Stevens Treaties and were not entitled to treaty rights. *United States v. Washington,* 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd,* 641 F.2d 1368 (9th Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982).

Judge Boldt's entry of the 1979 Judgment perplexed the Intervening Tribes for three reasons which, at the time, appeared to be coincidental, but which now may be explained by the recently learned fact of Judge Boldt's Alzheimer's disease. First, although known as a jurist who did most of his own drafting, Judge Boldt signed, almost without change, the proposed order drafted and submitted by the United States three years earlier in 1976. This was unusual for Judge Boldt, who had corrected many proposed findings and added new ones when he made his

1974 decision regarding the treaty rights of the other tribes. *See* 384 F. Supp. at 348. Indeed, George D. Dysart, the attorney for the United States who submitted the draft of the 1979 Judgment signed by Judge Boldt, has been quoted as saying:

> The thing I liked was the degree to which Boldt and or his law clerk gave very careful scrutiny to every one of those paragraphs [in the earlier 1974 findings] .... The other thing that impressed me greatly was the number of times the judge made a modification to the (government's proposed) findings.

"Alzheimer's Strikes Indians Through Judge," *The Seattle Post-Intelligencer,* June 11, 1992, Subproceeding Docket 1, Exhibit 1 ("*Post-Intelligencer* article").

Second, instead of signing the copy from the court's files, Judge Boldt signed the U.S. Attorney's copy of the proposed order. It has never been clear how Judge Boldt obtained this copy or why he signed it rather than his own.

Third, and most remarkable, by signing the proposed findings essentially verbatim, Judge Boldt abandoned without comment the test he had applied in 1974 to the Stillaguamish and Upper Skagit Tribes in favor of a different, more restrictive, test for determining treaty tribe status. Having previously ruled that federal recognition was not necessary for treaty status in *United States v. Washington,* 384 F. Supp. at 378-79, by signing the 1979 Judgment, Judge Boldt held that only Indian tribes recognized by the federal government could be entitled to treaty rights. Indeed, the Court of Appeals commented on Judge Boldt's abrupt and unexplained change in standards when it reviewed the 1979 Judgment:

> Reviewing Judge Boldt's [1974] decision, we indicated that treaty-tribe status is established when "a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure."
>
> We stated that "[n]onrecognition of the tribe by the federal government . . . may result in the loss of statutory benefits, but can have no impact on vested treaty rights." Judge Boldt subsequently stated in resolving [the Intervening Tribes' status]: "Only tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States."
>
> This conclusion is clearly contrary to our prior holding and is foreclosed by well-settled precedent.

United States v. Washington, 641 F.2d at 1371 (citations omitted).

Although these facts all suggested that there was something wrong with the 1979 Judgment, the Intervening Tribes lacked the information necessary to adequately explain at the time what they believed to be a gross miscarriage of justice.[2]

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2. The 1979 Judgment is devastating to the Three Tribes for two reasons. First, the 1979 Judgment defines their status as non-treaty tribes for all time. Second, on a related issue, the Court of Appeals has stated on at least two occasions that the Three Tribes cannot vindicate their treaty rights through the federal recognition process. *See Greene v. Babbitt*, 64 F.3d 1266, 1270-71 (9th Cir. 1995); *Greene v. United States*, 996 F.2d 973, 977-78 (9th Cir. 1993). Thus, if the Three Tribes are unable to reopen the 1979 Judgment, they will be denied treaty tribe status permanently even though it appears that they did not have a competent decisionmaker.

A divided panel of the Court of Appeals affirmed the 1979 Judgment in *United States v. Washington,* 641 F.2d 1368 (9th Cir. 1981). Although the Court of Appeals determined that the 1979 Judgment had applied an improperly restrictive test to determine treaty tribe status, two members of the panel nevertheless voted to affirm on the ground that the district court's factual determinations that the Intervening Tribes lacked sufficient political and cultural cohesion to establish their treaty tribe status were not clearly erroneous. *Id.* at 1374. In reviewing Judge Boldt's findings of fact, including the crucial findings regarding political and cultural cohesion, the Court of Appeals utilized a deferential standard of review, stating: "Verbatim adoption of proposed findings of fact by the district court is ordinarily disfavored and calls for close scrutiny by an appellate court. But the district court's findings still must be upheld unless clearly erroneous." *Id.* at 1371 (citations omitted). This Court denied the Intervening Tribes' petition for certiorari. *United States v. Washington,* 454 U.S. 1143 (1982).

B. The Proceedings Below.

On June 11, 1992, The Seattle Post-Intelligencer published an article stating that Judge Boldt suffered from Alzheimer's disease beginning in 1978, the year before he issued the 1979 Judgment. Prior to the appearance of the *Post-Intelligencer* article, the Three Tribes had not been aware of the fact that Judge Boldt had been suffering from Alzheimer's disease.

In the *Post-Intelligencer* article, George B. Boldt, Judge Boldt's son, discussed his father's medical condition:

> "He [Judge Boldt] was so bright, so sharp, so articulate all his life until February of 1978," his son said. "He was a different man afterwards. He went into a state of

> deterioration. He went into a six-year decline" that ended with his death in 1984.
>
> "He started to develop a lot of the symptoms of Alzheimer's and continued to have them," his son said.

The article also cited Judge Boldt's death certificate, which showed that he had Alzheimer's disease for at least six years prior to his death in 1984. George Dysart, the attorney for the United States, was also quoted in the *Post-Intelligencer* article as saying, "There is no question but that he was failing." Due to the insidious, debilitating nature of Alzheimer's disease, a brain disorder that impairs reasoning and memory, these reports raised the serious possibility that Judge Boldt's ability to engage in legal reasoning was impaired in March 1979 when he issued the 1979 Judgment.

Prompted by this new information, the Three Tribes filed their Rule 60(b)(6) Motion on November 22, 1993, asking the district court to reopen the 1979 Judgment. In their motion, the Three Tribes sought the opportunity to conduct discovery in order to learn the truth about Judge Boldt's condition at the time he signed the 1979 Judgment. The Three Tribes represented to the district court that if the evidence obtained through discovery warranted further action, the Three Tribes would then seek the opportunity to present evidence at an evidentiary hearing.

In support of their motion to the district court, the Three Tribes presented three types of evidence which, when taken together, raised serious concerns about Judge Boldt's mental competence at the time he signed the 1979 Judgment.

First, the Three Tribes pointed to evidence that Judge Boldt had Alzheimer's disease when he signed the 1979 Judgment.

This evidence included his death certificate, which stated that he died of Alzheimer's disease and had been diagnosed with it one full year before he signed the 1979 Judgment. It also included the public statements of his son that his father was "a different man" after his surgery in February 1978 and "went into a state of deterioration" and "started to develop a lot of symptoms of Alzheimer's and continued to have them" as well as a public statement by the attorney for the United States in the case that "[t]here is no question but that [Judge Boldt] was failing."

Second, the Three Tribes pointed to evidence that Judge Boldt's Alzheimer's may have directly affected his decisionmaking process. This included the facts that (a) the judge abandoned without comment the legal standard he had earlier applied in the very same case to similar parties and which had been endorsed by the Court of Appeals; (b) he departed from his usual practice by signing, virtually verbatim, proposed findings submitted by the United States; and (c) he signed the U.S. Attorney's copy of the proposed findings rather than the copy filed with the court, and there is no explanation in the record as to how or why the United States Attorney's copy got into his hands.

Third, the Three Tribes pointed to evidence that the 1979 Judgment may have been in error because a subsequent decision by the Bureau of Indian Affairs on a related issue contradicted many of the findings contained in the 1979 Judgment.[3]

The United States, the State of Washington and several of the Indian tribes with treaty tribe status opposed the Rule 60(b)(6) Motion. The district court denied the motion on January

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3. In 1996, a district court judge in another related case issued a decision which also contradicted many of the findings in the 1979 Judgment.

23, 1995, holding that the moving parties had suffered "no manifest injustice." As the basis for its ruling, the district court stated that it did not matter whether Judge Boldt was competent at the time he decided the Three Tribe's entitlement to treaty rights, since the magistrate before him and the Court of Appeals after him similarly concluded that the Tribes were not entitled to treaty rights, and, therefore, "the result [did] not rest on Judge Boldt's decision alone." (App. C at 30a).

The Three Tribes timely appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's order and subsequently denied a petition for rehearing and rehearing en banc. The panel members differed sharply, however, in their reasoning. Two of the members stated that the Three Tribes had not presented " 'extraordinary circumstances' [sufficient to] warrant vacating an 'erroneous judgment.' " (App. A at 11a). In so doing, it appears that they ignored the fact that the Three Tribes were not asking at that time for the 1979 Judgment to be vacated but were, instead, merely asking for post-judgment discovery so they could confirm or refute the mental competence of the judge. In addition, the two members, like the district court, also relied on the fact that the magistrate judge and the Court of Appeals reached the same conclusion as did Judge Boldt (App. A at 12a), even though Judge Boldt did not accept the magistrate's report and the Court of Appeals did not make *de novo* findings but merely affirmed using the clearly erroneous standard.

The other member concurred in the ruling but held that the Three Tribes were not entitled to discovery because "Rule 60(b) may not be used to set aside a judgment based on a federal judge's perceived lack of mental competence." (App. A at 19a) (Kozinski, J., concurring). He went on to state, however, that, if he were wrong as to the availability of relief, the Three Tribes had made a sufficient showing to justify granting the post-

judgment discovery they requested. (App. A at 16a-17a) (Kozinski, J., concurring).

Taken together, the import of the majority and concurring opinions is clear. In refusing to allow post-judgment discovery, the opinion below implies that a litigant has no remedy if a judge is not competent to hear a matter, and also ignores or trivializes the role of the district court judge as a fact-finder.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT TO A COMPETENT AND IMPARTIAL TRIER OF FACT.

The Three Tribes' petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior rulings on a litigant's fundamental due process right to a fair trial. In delineating the contours of this right, this Court has consistently identified two necessary elements: "impartiality" and "mental competence." *Jordan v. Commonwealth of Massachusetts*, 225 U.S. 167, 176 (1912) (holding that "[d]ue process implies a tribunal both impartial and *mentally competent* to afford a hearing.") (emphasis added); *Tanner v. United States*, 483 U.S. 107, 126 (1987) (same).

It is clear that the due process requirement of impartiality applies both to jurors, *e.g., Peters v. Kiff*, 407 U.S. 493 (1972) (holding that "a defendant cannot, consistent with due process, be subjected to trial by . . . jurors who are intimidated by the threat of mob violence, or by jurors who have formed a fixed

opinion about the case from newspaper publicity.") (citations omitted), and to judges. *e.g., Tumey v. State of Ohio,* 273 U.S. 510, 523 (1927) (holding that due process is violated when a defendant is subjected to a judge who has "a direct, personal, substantial pecuniary interest in reaching a conclusion against him in a case."); *In re Murchison,* 349 U.S. 133, 136 (1955) ("no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); *see also Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 822 (1986) (discussing various cases where due process required a judge to recuse himself from proceedings).[4]

With respect to the requirement of "mental competence," this Court has held that due process is violated when a decision is rendered by a mentally incompetent juror. *Jordan,* 225 U.S. at 176; *Peters,* 407 U.S. at 501 (due process is violated when a person is "subjected to trial by an insane juror") (citing *Jordan*); *see also McIlwain v. United States,* 464 U.S. 972 (1983) (Marshall, J. and Brennan, J., dissenting from denial of a petition for certiorari) ("This Court as well as other courts have recognized the right to a mentally competent jury.").

With respect to the mental competence of a judge, however, the Three Tribes are aware of only one case in which this Court has been asked to address the issue. In *Smith v. Cox,* 435 F.2d 453 (4th Cir. 1970), the Fourth Circuit stated, in dicta, that the senility of a sentencing judge in a state court proceeding would violate the due process requirements of the Fourteenth Amendment. In arriving at this conclusion, the Fourth Circuit explained:

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4. The importance of judicial impartiality has been emphasized this term by the Court's decision to hear *Bracy v. Gramley,* No. 96-6133. In *Bracy,* the question presented for review is whether a habeas petitioner in a capital case is entitled to post-judgment discovery to support a claim that he was denied the right to a trial before an impartial judge.

> We have no doubt that the due process clause of the fourteenth amendment guarantees that the determination of sentence be made by a judicial officer mentally competent to carry out his duties. To permit a mentally impaired man to weigh the myriad considerations and to make the difficult choices involved in fixing a punishment . . . would surely violate the standards of fair play established by the due process clause. *Mental incompetence is at least as serious a defect as prejudice or interest on the part of a judge, both of which have already been held constitutionally impermissible.*

Id. at 460 (emphasis added).

On appeal, this Court vacated the Fourth Circuit's opinion. *Slayton v. Smith,* 404 U.S. 53 (1971). In so doing, the Court did not address the issue of mental competence. Instead, the Court held that, in a habeas corpus case where the petitioner had not exhausted his state remedies, the Fourth Circuit should not have addressed "the merits of so delicate a subject" as the issue of a judge's mental competence before the petitioner had brought his claims in state court. *Id.* at 54.

The Three Tribes agree that the issue of a judge's mental competence is a "delicate" subject. However, it is one that the United States Constitution compels the Three Tribes to address here.[5] The due process clause entitles the Three Tribes to a

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5. Moreover, this issue is likely to become more prevalent in the future as "[w]ith the size of the federal judiciary steadily on the rise, and with advances in medical technology making it possible to survive disabilities that would have been fatal in earlier days, the delicate question of whether a judge has (or in the past had) the mental capacity to sit will become increasingly troublesome." (App. A at 18a) (Kozinski, J., concurring).

mentally competent judge who can consider the case, weigh the evidence presented, evaluate the arguments of all sides, and form conclusions leading to a final decision. By denying the Three Tribe's Rule 60(b)(6) Motion, two members of the panel refused to enforce this right, and the other member expressly denied its existence.

The Three Tribes' petition should be granted so that the Court may affirm the importance of its longstanding holdings on due process, and so that it may confirm for the first time that the right to a competent decisionmaker applies to a judge.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE IMPORTANCE OF RULE 60(b)(6) AS A MEANS OF EFFECTUATING DUE PROCESS RIGHTS.

The Three Tribes' petition for writ of certiorari should be granted because the opinion below also conflicts with this Court's prior rulings on the importance of Rule 60(b)(6) as a vehicle to correct violations of a party's due process rights.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), this Court held that Rule 60(b)(6) may be used to reopen and vacate a final judgment when a party learns, after a judgment has become final, that the judge may not have been impartial.[6] The Court explained:

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6. In *Liljeberg*, the parties and the judge learned only after the issuance of the opinion and its affirmance by the United States Court of Appeals for the Fifth Circuit that Loyola University, on whose board of trustees the judge served, had a financial interest in the litigation.

> Federal Rules of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment. In particular Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," . . . . The Rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," while also cautioning that it should only be applied in "extraordinary circumstances."

Id. at 863-64 (footnotes and citations omitted). In holding that the use of Rule 60(b)(6) was appropriate, the Court weighed "the risk of injustice to the parties . . . , the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864.

These factors apply equally to a case, such as the one at bar, involving a potential lack of "competence" as it does to one, such as *Liljeberg*, involving a potential lack of "impartiality." According to the concurrence in the Ninth Circuit's opinion below, however, a litigant can find no relief under Rule 60(b)(6) when it seeks to reopen a case it believes was decided by a mentally incompetent judge. Instead, the concurrence finds that the only relief a litigant has in a situation involving a mentally incompetent judge "is to complain to the circuit judicial council" pursuant to 28 U.S.C. § 372(c). (App. A at 14a) (Kozinski, J., concurring). Putting aside the fact that this statute became effective in October 1981 and was not available to the Three Tribes at the time of the 1979 Judgment,

as a remedy it is only prospective and does not allow a litigant to avoid the effect of a judgment made by an incompetent judge. (App. A at 14a n. 1 ("our judicial council has stated repeatedly that it may not address any matter that concerns the merits of a case and might be raised through normal channels of appellate review")). As such, the statutory procedure cannot be used to effectuate the right to a competent tribunal; it can only be used to protect future litigants from suffering the same fate.

Due process is not served for one litigant simply by preventing others from suffering similar violations of their due process rights in the future. If the right to a competent judge is to have any meaning, a litigant must be able to raise the issue on appeal, if the judge's disability manifests itself within the time for appeal, or, as in *Liljeberg*, in a motion pursuant to Rule 60(b)(6) if it manifests itself afterwards.[7]

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DISREGARDS THIS COURT'S PRIOR RULINGS ON THE CRUCIAL ROLE OF A DISTRICT COURT JUDGE AS A TRIER OF FACT.

In the opinion below, the Ninth Circuit implies that the Three Tribes have suffered no prejudice because, even if Judge Boldt was mentally incompetent at the time he issued the 1979

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7. The Three Tribes did not have the opportunity to observe Judge Boldt during his decisionmaking process. Even though the Three Tribes had an opportunity to view the judge during the hearing on the merits of their case in January 1977, he did not decide the case until March of 1979, and it was not until February 1978 that he was diagnosed with Alzheimer's. Moreover, the judge retired immediately after signing the 1979 Judgment so that there were not other opportunities for the Three Tribes to observe him, and it was not until many years later that they learned of his Alzheimer's and the likely reason for his otherwise inexplicable ruling.

Judgment, his opinion was subsequently affirmed by a competent court of appeals. (App. A at 12a). By so doing, the Ninth Circuit fails to acknowledge the important fact-finding responsibilities that are vested in the district court judge.

In the 1979 Judgment, Judge Boldt made crucial findings of fact. Among these were that the Three Tribes lacked sufficient political and cultural cohesion to entitle them to rights under the Stevens Treaties. In reviewing these findings, the Court of Appeals utilized a deferential standard of review, noting that "the district court's findings still must be upheld unless *clearly erroneous*." *United States v. Washington,* 641 F.2d at 1371 (emphasis added).

This Court outlined the nature and rationale underlying this limited standard of review in *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564 (1985). There, this Court explained that "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* at 574-575; *see also United States v. Oregon State Medical Society,* 343 U.S. 326, 339 (1952) ("Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded.").

Thus, in affirming the 1979 Judgment, the Court of Appeals relied heavily on Judge Boldt's judgment and expertise as the trier of fact. If Judge Boldt was not mentally competent to exercise such judgment and make such determinations, the limited review by the Court of Appeals would not cure or render harmless the prejudice suffered by the Three Tribes. By implying otherwise, the Ninth Circuit has disregarded this Court's prior holdings on the important role played by the district court judge

as a trier of fact. For this reason, as well, the Three Tribes' petition should be granted.

CONCLUSION

This case presents a question of exceptional importance — whether a litigant is entitled to relief from a judgment if the district court judge was mentally incompetent when he made it. If the opinion below is allowed to stand, the Three Tribes will have been denied due process and will forever suffer the consequences of a decision that may well have been rendered without a mentally competent tribunal. By granting the Three Tribes' petition for certiorari, however, this Court can correct the Ninth Circuit's decision, which defies this Court's longstanding holdings that a litigant has a due process right to an impartial *and* mentally competent tribunal, and that Rule 60(b)(6) can be used to effectuate this right. In so doing, this Court can also reaffirm the important role played by the district court judge as a trier and finder of fact.

Accordingly, the Three Tribes respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 23, 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

DUWAMISH INDIAN TRIBE;
SNOHOMISH INDIAN TRIBE;
STEILACOOM INDIAN TRIBE,
Plaintiffs-Intervenors-Appellants,

v.

STATE OF WASHINGTON; NISQUALLY INDIAN TRIBE; HOH INDIAN TRIBE; LUMMI INDIAN NATION; SKOKOMISH INDIAN TRIBE; JAMESTOWN BAND OF KLALLAMS; LOWER ELWHA KLALLAM TRIBE; PORT GAMBLE BAND CLALLAM; MUCKLESHOOT INDIAN TRIBE; QUINAULT INDIAN NATION; QUILEUTE INDIAN TRIBE; TULALIP TRIBE; MAKAH INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; PUYALLUP TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; NOOKSACK TRIBE; UPPER SKAGIT TRIBE,
Defendants-Appellees.

No. 95-35202
D.C. No.
CV-70-09213-BJR
OPINION

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted
December 5, 1995—Seattle, Washington

Filed October 23, 1996

Appendix A

Before: Betty B. Fletcher, Alex Kozinski, and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy;
Concurrence by Judge Kozinski

SUMMARY

Civil Litigation and Procedure/Judgments and Orders

The court of appeals affirmed an order of the district court. The court held that a party is not entitled to relief from a years-old affirmed judgment based on evidence of the trial judge's affliction with a mentally debilitating illness at the time of the decision.

While presiding over an intervention motion by five Indian tribes in an action concerning tribal fishing rights under a treaty, district court judge Boldt asked the chief judge to remove him from the case due to ill health. When the tribes asked that Judge Boldt decide the dispositive legal issue, he indicated his willingness to rule on the matter. The chief judge granted the tribes' motion. Adopting the appealed-from findings and recommendation of a magistrate judge, Judge Boldt ruled in 1979 that the five tribes had no rights under the treaty.

Applying "close scrutiny" because Judge Boldt had adopted the findings and conclusions submitted by the United States, the court of appeals affirmed. The court held that although Judge Boldt had applied the incorrect test, his legal conclusion was correct under the appropriate legal standard. The Supreme Court denied the tribes' certiorari petition. Judge Boldt died in 1984.

In 1991, a Seattle newspaper article reported that Judge Boldt's death certificate indicated that a secondary cause of

his death was Alzheimer's disease. Judge Boldt's son was quoted as saying that his father's medical condition had deteriorated after February 1978 and that he had developed many symptoms of Alzheimer's. The son also stated that he believed that Judge Boldt was mentally competent when he ruled against the tribes.

In 1993, appellants Duwamish Indian Tribe, Snohomish Indian Tribe and Steilacoom Indian Tribe, three of the original five tribes in the underlying action, moved for relief from the judgment under Rule 60(b)(6) for the limited purpose of conducting discovery into the condition of Judge Boldt's health at the time he rendered his 1979 decision. Rule 60(b) provides that a district court may relieve a party from a judgment for any reason justifying relief from the operation of the judgment.

The district court denied the motion. The court noted that 15 years had passed since Judge Boldt's decision, but rested its ruling on three factors: courts should avoid disturbing the public interest in the finality of judgments; a ruling for the three tribes would open a floodgate of litigation; and the three tribes suffered no manifest injustice because both the magistrate judge and the court of appeals had reached the same conclusion as Judge Boldt.

On appeal, the three tribes offered Judge Boldt's death certificate and the newspaper article to support their contention that they were entitled to relief from the judgment because he may have suffered some mental impairment in 1979.

[1] Rule 60(b)(6) provides courts with authority to enable them to vacate judgments when in extraordinary circumstances it is appropriate to accomplish justice. The Ninth Circuit has used Rule 60(b)(6) sparingly as an equitable remedy to prevent manifest injustice.

[2] This was not one of those rare cases where extraordinary circumstances warranted vacating an erroneous judg-

ment. The court of appeals and a magistrate judge closely examined the case and reached the same conclusion as Judge Boldt. A decision on whether Rule 60(b)(6) gives the district court the power to correct a manifest injustice arising from a judge's disability should await the extraordinary circumstances in which it might be presented. The district court did not abuse its discretion in denying the three tribes' motion to reopen the judgment and allow discovery.

Judge Kozinski concurred separately, expressing the view that Rule 60(b) did not apply to this situation at all, but if it did, the three tribes made a sufficient showing to justify discovery.

COUNSEL

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Appendix A

OPINION

LEAVY, Circuit Judge:

In 1979, United States District Judge George H. Boldt ruled that five Northwest Indian tribes had no treaty fishing rights. In 1993, three of these tribes, the Duwamish, Snohomish, and Steilacoom Tribes ("the Three Tribes"), petitioned the United States District Court for Western Washington for relief from the 1979 judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) on the ground that Judge Boldt may have suffered from Alzheimer's disease in 1979. The United States, the State of Washington, and most tribes with treaty fishing rights[1] opposed the Three Tribes' motion. On January 23, 1995, the district court denied the motion and the Three Tribes timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

FACTS AND PRIOR PROCEEDINGS

In 1970, the United States in its capacity as trustee for seven Indian tribes brought this action against the State of Washington to enforce the Stevens Treaties, which concern Indian fishing rights.[2] Seven other tribes intervened as plaintiffs. In 1974, Judge Boldt ruled that all fourteen tribes had treaty fishing rights which entitled them to take up to fifty percent of the harvestable fish passing through their off-reservation fishing grounds. *United States v. Washington*, 384 F. Supp. 312.[3]

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[1]The Lummi won fishing rights in 1974, *United States v. Washington*, 384 F. Supp. 312, 327 n.2 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), but they took no position in the case at bar.

[2]The treaties are named for Isaac I. Stevens, the Governor of the Washington Territory, who negotiated eleven treaties on behalf of the United States with several Indian tribes in 1854 and 1855.

[3]There was great resistance to Judge Boldt's decision and, consequently, enormous demands on the district court:

Appendix A

After Judge Boldt's 1974 decision, five additional tribes moved to intervene as plaintiffs in *United States v. Washington*: the Duwamish, Snohomish, Steilacoom, Snoqualmie, and Samish ("the Five Tribes"). On September 13, 1974, Judge Boldt referred the issue of the treaty status of these Five Tribes to Magistrate Judge Robert E. Cooper. Magistrate Judge Cooper held hearings and received evidence on whether the Five Tribes had treaty fishing rights. On

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"The state [of Washington]'s extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." *Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d 1123, 1126 (9th Cir. 1978) (citations omitted), *aff'd in part and vacated in part*, 443 U.S. 658 (1979). The issue of what, if any, right Indians had to fish under the Stevens Treaties ultimately reached the Supreme Court in 1979. This was only after the Washington State Supreme Court enjoined the Washington State Department of Fisheries from adopting fishing regulations to protect the Indians' treaty rights. *Puget Sound Gillnetters Ass'n v. Moss*, 88 Wash. 2d 677, 565 P. 1151 (1977); *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 571 P. 2d 1373 (1977), *vacated and remanded*, 443 U.S. 658 (1979). The Supreme Court affirmed Judge Boldt's reading of the Stevens Treaties. 443 U.S. at 685. Indeed, Judge Boldt's 1974 decision has become an integral part of natural resource management in the northwest. State governments follow it when crafting fish management plans. *See United States v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985) (approving the 1985 Puget Sound Management Plan); *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990) (approving the Columbia River Fish Management Plan), *cert. denied*, 501 U.S. 1250 (1991). So does the federal government. *See* 60 Fed. Reg. 21746, 21750 (May 3, 1995) (salmon fisheries regulations concerning the treaty tribes). Judge Boldt's 1974 decision even affects international agreements. *See Confederated Tribes & Bands of Yakima Indian Nation v. Baldridge*, 605 F. Supp. 833 (W.D. Wash. 1985) (approving stipulations regarding the United States-Canada Pacific Salmon Treaty); 16 U.S.C. § 3632 (creating a tribal seat on the International Pacific Salmon Commission); 50 C.F.R. § 301.20 (International Pacific Halibut Commission regulations concerning the treaty tribes).

Appendix A

March 5, 1975, Magistrate Judge Cooper issued a Report finding that none of the Five Tribes had maintained their political cohesion, and thus recommending a conclusion of law that none had rights under the Stevens Treaties. After appeal by the Five Tribes from the magistrate judge's report, Judge Boldt held a three-day de novo evidentiary hearing later in 1975, directed the parties to submit additional evidence in 1976, and heard oral argument in 1977.

In February 1978, before issuing a decision, Judge Boldt underwent surgery for an aortic aneurysm. By letter dated July 25, 1978, Judge Boldt informed all counsel involved in the pending case that, although he was making "very good progress" in recovering from surgery, he was not fully recovered. He stated his intent to rule on the status of the Five Tribes within the next several months.

However, on February 7, 1979, Judge Boldt notified all counsel that, in light of his health, he had asked then Chief Judge Walter T. McGovern to remove him from the case. The Samish, Snoqualmie, Snohomish, and Steilacoom tribes filed a motion on February 15, 1979, in which they requested that Judge Boldt decide whether they qualified as treaty tribes with respect to fishing rights. In an order dated March 14, 1979, Chief Judge McGovern granted the tribes' motion on the grounds that it was "in the best interests of judicial administration and economy, and in the interest of all parties." In a footnote, Judge McGovern stated that "[t]he court has been informed that Judge Boldt is willing, if requested, to consider and issue a ruling on this matter."

Nine days later, on March 23, 1979, Judge Boldt ruled that the Five Tribes had no rights under the Stevens Treaties. *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). In doing so he adopted with minor changes the proposed findings of fact and conclusions of law submit-

ted by the United States. On April 25, 1979, Judge Boldt denied the tribes' motion for reconsideration.

The Five Tribes appealed to this court, which, in a split decision, affirmed Judge Boldt. 641 F.2d at 1374. Because Judge Boldt adopted the proposed findings of the United States, his decision was given "close scrutiny." *Id.* at 1371. This court concluded that Judge Boldt had applied an incorrect legal test (i.e., that federal recognition or nonrecognition was decisive) to determine whether a tribe had treaty rights. The proper inquiry was whether a "group of Indian descendants . . . have maintained an organized tribal structure." *Id.* at 1372. Applying the correct test directly to the record, this court concluded "[a]fter close scrutiny, . . . that the evidence supported [Judge Boldt's] finding of fact" that the tribes had not functioned since treaty times as "continuous separate, distinct and cohesive Indian cultural or political communit[ies]." *Id.* at 1373. This court affirmed Judge Boldt because "the district court correctly resolved this question despite its failure to apply the proper standard." *Id.* at 1374.

The United States Supreme Court subsequently denied the tribes' petition for certiorari. 454 U.S. 1143 (1982).

Judge Boldt died in 1984.

On June 11, 1992, the *Seattle Post-Intelligencer* published a front-page article, "Alzheimer's Strikes Indians Through Judge," which reported that, at the time of his 1979 ruling, Judge Boldt suffered from Alzheimer's disease. Paul Shukovsky, ***Alzheimer's Strikes Indians Through Judge***, Seattle Post-Intelligencer, June 11, 1992, at A1, A6. The article was based, in part, on Judge Boldt's death certificate which lists pneumonia as the immediate cause of death and Alzheimer's disease as a secondary cause. According to the death certificate, the Alzheimer's set in during 1978. In the newspaper article, Judge Boldt's son is quoted concerning his father's medical condition:

> "He was so bright, so sharp, so articulate all his life until February of 1978," his son said. "He was a different man afterwards. He went into a state of deterioration. He went into a six year decline" that ended with his death in 1984.
>
> "He started to develop a lot of the symptoms of Alzheimer's and continued to have them," his son said.

Judge Boldt's son also stated in the article that he believed his father to have been mentally competent when he ruled against the tribes in 1979: "He loved the law." "He would not do anything to violate his duties as a judge."

On November 22, 1993, the Three Tribes filed a motion in the United States District Court for Western Washington for relief from Judge Boldt's 1979 judgment pursuant to Rule 60(b)(6). At oral argument on the motion, held on November 11, 1994, almost a year after the motion was filed, the Three Tribes argued that their motion was for the limited purpose of conducting discovery into the state of Judge Boldt's mental health at the time he rendered his 1979 decision. The record does not indicate that the Three Tribes moved for discovery during oral argument or in the year that elapsed between the time they filed their Rule 60(b)(6) motion and their oral argument.

On January 23, 1995, Judge Barbara J. Rothstein, without deciding whether the broad language of Rule 60(b)(6) provided a remedy in case of a judge's disability, denied the Three Tribes' motion. The district court noted that 15 years had passed since Judge Boldt's decision, but "decline[d] to deny the tribes' motion on this ground alone." Instead, the court rested its denial on three foundations. First, courts should avoid disturbing the public interest in the finality of judgments. Second, a ruling for the Three Tribes would open the floodgates to future challenges to judgments on grounds

of judicial incompetence. Third, the Three Tribes suffered no "manifest injustice" because the magistrate judge and the Ninth Circuit reached the same conclusion as Judge Boldt. The district court concluded that "the moving tribes have failed to demonstrate the existence of any extraordinary circumstances which would warrant reopening the final order of March 23, 1979 for the purpose of conducting discovery into Judge Boldt's mental health. Their [60(b)(6)] motion is accordingly denied." The Three Tribes timely appeal.

STANDARD OF REVIEW

This court reviews a district court's denial of a Rule 60(b) motion for an abuse of discretion. *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993). Under the abuse of discretion standard, a reviewing court may not reverse unless it has a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1464 (9th Cir.) (quotations and citations omitted), *cert. denied*, 116 S. Ct. 301 (1995).

ANALYSIS

[1] Rule 60(b) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6).

> [Rule 60(b)(6)] does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," *Klapprott v.*

United States, 35 U.S. 601, 614-15, 69 S. Ct. 384, 390, 93 L. Ed. 266 (1949), while also cautioning that it should only be applied in "extraordinary circumstances," *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207 (1950). *Lilejeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988).

Following the admonitions of the Supreme Court, we have used Rule 60(b)(6) "sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir.), *cert. denied*, 114 S. Ct. 60 (1993). "The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Id.*

[2] The Three Tribes argue that 60(b)(6) relief should be granted and discovery allowed because of the possibility that they were denied a competent fact-finder when their treaty status was decided by Judge Boldt. This is not one of those rare cases where "extraordinary circumstances" warrant vacating an "erroneous judgment." The Three Tribes offer only Judge Boldt's death certificate and the *Seattle Post-Intelligencer Article* to support their contention that Judge Boldt may have suffered some mental impairment in 1979. The death certificate states that Judge Boldt was diagnosed with Alzheimer's sometime in 1978. In the newspaper article Judge Boldt's son says that his father was a changed man after his 1978 surgery, but that he was mentally competent when he decided the tribes' treaty status. The correspondence from Judge Boldt shows that the judge knew his surgery had physically weakened him and that he also knew of his obligation to decide the tribes' treaty status. When he felt unable to fulfill his commitment to decide the tribes' status "within the next several months," he asked Chief Judge McGovern to remove him from the case. The tribes responded by requesting that Judge Boldt rule on their status before stepping down.

Chief Judge McGovern allowed their motion and Judge Boldt ruled. We should not reopen a judgment under these circumstances. Moreover, this court, as well as a magistrate judge, closely examined the case and reached the same conclusion as Judge Boldt. A decision on the issue of whether Rule 60(b)(6) gives the district court the power to correct a manifest injustice arising from a judge's disability should await the extraordinary circumstances in which it might be presented. The district court did not abuse its discretion in denying the Three Tribes' motion to reopen the judgment and allow discovery.

The district court's denial of the Three Tribes' motion is AFFIRMED.

KOZINSKI, Circuit Judge, concurring:

The majority holds that "[t]he district court did not abuse its discretion in denying the . . . Tribes' [Rule 60(b)] motion to reopen the judgment and allow discovery." Maj. op. at 10. In this my colleagues err twice. Their first error is assuming that 60(b) applies to this situation at all and, therefore, that the court *had* discretion to deny or grant relief. In fact, the district court could have granted the Tribes no relief, even had they shown conclusively that Judge Boldt was mentally impaired when he rendered judgment against them. The second error derives from the first: Having presumed that Rule 60(b) applies, the majority holds that plaintiffs did not make a showing sufficient to warrant discovery into Judge Boldt's disability. But it seems to me plaintiffs have made a more-than-sufficient showing to justify discovery, *were* 60(b) applicable.

This is one time when two wrongs do make a right, which is why I am concurring rather than dissenting. But the majority, I fear, leaves misleading tracks in the sand for other courts and litigants to follow.

Appendix A

1. I start with the proposition that Rule 60(b) is only a time-shifting provision; it does not confer independent authority on federal courts to set aside past judgments. Or, to put it differently, Rule 60(b) authorizes setting aside a judgment only for reasons that would have prevented entry of the judgment in the first place, had the reasons been known at the time judgment was entered. In deciding whether the district court was authorized to grant the Tribes relief, we must therefore answer the following question: Would Judge Boldt's disability (had it been known at the time he ruled against the Tribes) have been grounds for securing his recusal, or for reversing his judgment on appeal?

The answer is no. Under 28 U.S.C. §§ 144 or 455, a party may petition a judge to remove himself from a case in which he has a financial conflict of interest. *See* 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3550 (1984); 7A *Federal Procedure L. Ed.* § 20:47-54 (Thomas T. Trenkner et al. eds., 1992); *Liljeberg* v. *Health Services Acquis. Corp.*, 486 U.S. 847, 863-70 (1988). A judge's failure to recuse himself can also be raised on direct appeal, *see, e.g.*, *Yagman* v. *Republic Ins.*, 987 F.2d 622, 626-27 (9th Cir. 1993), or by petition for mandamus. *In re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1025 (9th Cir. 1982). If the conflict of interest is disclosed only after the judgment becomes final, the judgment can be set aside under Rule 60(b)(6). *Liljeberg*, 486 U.S. at 863.

A party can force a judge to recuse himself in such circumstances because financial conflict is an enumerated ground for disqualification under section 455. There are other grounds for disqualification in sections 144 and 455, such as bias, prejudice and personal knowledge of disputed evidentiary facts. *See generally* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (1996). But a litigant who would force a judge to disqualify himself must point to some *statutory* ground for recusal; there is no residual common law authority for judicial disqualification. *See, e.g.*,

Sinito v. *United States*, 750 F.2d 512 (6th Cir. 1984)(claim that judge was assigned to case in violation of court's random draw policy not a basis for disqualification).

Disability, mental or physical, is not one of the grounds enumerated in sections 144, 455 or any other statute; it is, therefore, not a proper basis for seeking a judge's recusal. The only recourse when a judge is believed to be disabled is to complain to the circuit judicial council. *See* 28 U.S.C. § 372(c). If the council, after investigation, finds the judge unfit to serve, it may request that he voluntarily retire, order that no further cases be assigned to him temporarily or take "such other action as it considers appropriate." 28 U.S.C. § 372(c)(6)(B).[1] Unlike a motion to recuse under sections 144 or 455, which is raised in the particular case where the conflict arises, a section 372(c) complaint is handled as a separate, quasi-adjudicative proceeding.[2]

As my colleagues may recall, section 372 was passed in response to the problem posed by an Article III judge who was thought unfit to serve but could not be removed because he had not committed an impeachable offense. *See Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970); H.R. Rep. No. 1313, 96th Cong., 2d Sess. 12 (1980)("An

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[1]Section 372 seems to authorize only prospective relief. The judicial councils, insofar as I am aware, may not take action in a pending case. Indeed, our judicial council has stated repeatedly that it may not address any matter that concerns the merits of a case and might be raised through normal channels of appellate review. *See In re Charge of Judicial Misconduct*, 691 F.2d 924, 925 (9th Cir. Jud. Coun. 1982)("The complaint procedures of [section 372] provide administrative remedies only in the absence of an appropriate judicial remedy."); *In re Charge of Judicial Misconduct*, 685 F.2d 1226, 1227 (9th Cir. Jud. Coun. 1982)(section 372 relief not available when matter is "reviewable under any other provision of law on the record" (quoting S. Rep. No. 362, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4317)).

[2]The decision of the judicial council is not reviewed by any court; appeal is to the Judicial Conference of the United States. 28 U.S.C. § 372(c)(10).

illustration of the type of complaint that might be referred directly to the Judicial Conference [under the House version of the Act] . . . could involve circumstances like those existing in *Chandler* v. *United States.*"); *Judicial Tenure and Discipline 1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House of Representatives Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 27, 39, 45, 82-83, 107-08, 111, 114 (1979-80) (discussing *Chandler*). In dealing with the problem, Congress was aware of the Article III implications of removing a judge from further service by means short of impeachment. *See Chandler*, 398 U.S. at 136 ("What the Judicial Council did when it ordered petitioner to 'take no action whatsoever in any case or proceeding now or hereafter pending' in his court was to do what only the Court of Impeachment can do.") (Douglas, J., joined by Black, J., dissenting). Section 372 was, for that reason, highly controversial and viewed by some as an unconstitutional encroachment on Article III independence. *See* S. Rep. No. 362, 96th Cong., 2d Sess. 21 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4334 ("[T]he Judiciary was given no power [by the Constitution], either express or implied, to police its own members.")(additional Views of Senator Howell Heflin); *id.* at 27 ("[The Judicial Conduct and Disability Act] would pose a direct and serious threat to the time-honored and constitutionally enshrined principle of judicial independence.")(additional Views of Senator Charles McC. Mathias, Jr.); *id.* at 29 ("I believe [the Judicial Conduct and Disability Act] will chill the independence of the Federal Judiciary . . . .")(additional Views of Senator Paul Laxalt). *See also* Frank J. Battisti [Chief Judge, United States District Court, Northern District of Ohio], *An Independent Judiciary or an Evanescent Dream*, 25 Case W. Res. L. Rev. 711, 714-15 (1975)(arguing that the "vague and overbroad language of the section . . . present[s] a significant threat to the independence of the federal judiciary."); Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform*

and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117, 1141 (1985)(blaming congressional "impatience" for "alluring [but] unconstitutional" Act).

Section 372 reflects a carefully crafted compromise between maintaining Article III independence and ensuring a competent judiciary. In striking this balance, Congress gave the judicial councils, not the courts of appeals, the power to remove disabled judges. The judicial councils, composed as they are of district and circuit judges, *see* 28 U.S.C. § 332(a)(1), are far better suited to deal with the delicate problem of judicial disability than are panels of the courts of appeals. For appellate judges, sitting in a particular case, to disqualify a district judge because they believe him unfit to serve would upset the balance embodied in section 372 and exceed the authority conferred by sections 144 and 455. The Tribes thus could not have forced Judge Boldt's recusal had they been aware of his disability while he was presiding over their case. It follows, *a fortiori*, that his judgment cannot be set aside on this basis years later under Rule 60(b).[3]

2. The majority's second — offsetting — error concerns the availability of discovery under Rule 60(b). Because I do not believe 60(b) applies here at all, this portion of the opinion is irrelevant to my analysis. Nevertheless, I am concerned that the majority makes some bad law in this area. The majority holds that the district judge did not abuse her discretion in denying the Tribes discovery into Judge Boldt's mental health at the time he rendered his judgment. But, *were* mental dis-

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[3]The majority also seems to suggest that the effect of Judge Boldt's disability, if any, was ephemeral because the magistrate below and the court of appeals above agreed with him. Maj. op. at 13960. Whatever one may think of this argument — which seems to seriously understate the role of the district judge — it would presumably apply only to cases where the key rulings concerned questions of law. In cases where a judge exercised powers peculiar to a nisi prius court — such as making findings of fact or exercising discretion — this portion of the majority's analysis would seem to cut the other way.

ability a proper basis for setting aside the judgment, plaintiffs would have made a sufficient showing.

By way of analogy, imagine a newspaper report that Judge X secretly owned stock in a corporation that was a party before him some years ago. And imagine that the article reveals the name of a broker who maintained the judge's clandestine account. Surely the losing party would be entitled to obtain discovery from the broker to help figure out whether the judge had a financial stake in the outcome of the case. This is because the judge's stock ownership would have been grounds for disqualification under 28 U.S.C. § 455. That the information reached the moving party late would be no basis for refusing discovery, *see Liljeberg*, 486 U.S. at 863-70, so long as the party acted in good faith and made out a reasonable case that discovery might lead to relevant information. *See* Fed. R. Civ. P. 26.

The same would be true if we held — mistakenly — that disability is a proper ground for setting aside a district court judgment. The Tribes have made a strong showing that Judge Boldt was mentally impaired when he decided their case. They are, after all, relying on the statement of a close relative who has no conceivable motive to lie and who appears to have a clear memory of when the judge's mental impairment became apparent. There is also a death certificate showing that the judge was diagnosed with Alzheimer's in 1978 — a year before he rendered the disputed judgement. While the majority may be correct that Judge Boldt "knew his surgery had physically weakened him," maj. op. at 13959, there is no evidence he knew the extent of his mental impairment. *See* Lawrence K. Altman, *Alzheimer's Dilemma: Whether to Tell People They Have the Disease*, N.Y. Times, April 7, 1992, at C3 (noting that early symptoms are ambiguous and that "people with Alzheimer's have . . . a strong tendency to deny their condition."). If disability were a proper basis for setting aside the judgment, I can see no basis for denying the Tribes

the right to seek discovery from the judge's doctors to confirm or refute speculation about the judge's competence.

* * *

We have come a long way from the day when discussion of a judge's mental state was considered a breach of decorum. *See Slayton* v. *Smith*, 404 U.S. 53, 54 (1971)(per curiam) (chastising court of appeals for mentioning "so delicate a subject" as a judge's mental condition in a published opinion) (*vacating Smith* v. *Cox*, 435 F.2d 453, 459-60 (4th Cir. 1970)). With the size of the federal judiciary steadily on the rise, and with advances in medical technology making it possible to survive disabilities that would have been fatal in earlier days, the delicate question of whether a judge has (or in the past had) the mental capacity to sit will become increasingly troublesome.

My problem with the majority opinion is that it provides no answer to the central question raised by the Tribes: Are parties entitled to set aside a judgment if they can prove that the judge was *non compos mentis* at the time he rendered his decision? By resolving the case under the nebulous abuse of discretion standard, my colleagues leave open the possibility that, based on some other showing — or perhaps based on a similar showing presented to a different district judge — relief may be available. *See* note 3 *supra*. This is an open invitation to parties to rummage through the health records of judges who ruled against them five, ten, even twenty years ago, in the hope of coming up with a more compelling showing — or a district judge more receptive to the idea of reopening past judgments.

This is very bad medicine. Congress withheld mental disability as a basis for disqualifying judges; we have no business suggesting that perhaps "Rule 60(b)(6) gives the district court the power to correct a manifest injustice arising from a judge's disability . . . ." Maj. op. at 13960. We should slam

the door hard on the possibility — so hard that others will be discouraged from taking the same tack — by saying that Rule 60(b) may not be used to set aside a judgment based on a federal judge's perceived lack of mental competence. Period.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-35202

D.C. No. CV 70-09213-BJR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

DUWAMISH INDIAN TRIBE; SNOHOMISH INDIAN TRIBE; STEILACOOM INDIAN TRIBE,

Plaintiffs-Intervenors-Appellants,

v.

STATE OF WASHINGTON; NISQUALLY INDIAN TRIBE; HOH INDIAN TRIBE; LUMMI INDIAN NATION; SKOKOMISH INDIAN TRIBE; JAMESTOWN BAND OF KLALLAMS; LOWER ELWHA KLALLAM TRIBE; PORT GAMBLE BAND CLALLAM; MUCKLESHOOT INDIAN TRIBE; QUINAULT INDIAN NATION; QUILEUTE INDIAN TRIBE; TULALIP TRIBE; MAKAH INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; PUYALLUP TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; NOOKSACK TRIBE; UPPER SKAGIT TRIBE,

Defendants-Appellees.

Appendix B

ORDER

Before: FLETCHER, KOZINSKI, and LEAVY, Circuit Judges.

Judges Fletcher and Leavy have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE FILED JANUARY 23, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil Action No. 9213-R
Subproceeding No. 93-2

UNITED STATES OF AMERICA,

Plaintiff,

and

SAMISH, SNOHOMISH, SNOQUALMIE, and STEILACOOM INDIAN TRIBES,

Plaintiffs-Intervenors,

and

DUWAMISH INDIAN TRIBE,

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Appendix C

ORDER DENYING MOTION BY DUWAMISH, SNOHOMISH AND STEILACOOM INDIAN TRIBES TO REOPEN JUDGMENT UNDER RULE 60(b)

THIS MATTER comes before the court on a motion by the Duwamish Indian Tribe, the Snohomish Indian Tribe and the Steilacoom Indian Tribe ("the tribes") under Fed. R. Civ. P. 60(b) to reopen a judgment entered in this case on March 23, 1979. Having reviewed the motion together with all documents filed in support[1] and in opposition, having heard oral argument, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

In 1974, United States District Court Judge George H. Boldt held that tribes in Washington Territory which had signed treaties in the 1850's relinquishing their aboriginal rights to land in exchange for the right to take fish at all usual and accustomed places were entitled to take up to fifty percent of the harvestable fish passing through their off-reservation fishing grounds. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). *See also, State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Among the tribes intervening in the case before Judge Boldt in 1974 to assert treaty fishing rights were the Duwamish, Snohomish, Steilacoom, Snoqualmie and Samish Indian Tribes. On September 13, 1974, Judge Boldt referred the issue of the treaty-tribe status of these intervenors to a magistrate. After holding several hearings, the magistrate issued a report

1. Petitioners' motion to file an overlength brief in support of their motion to reopen the judgment is GRANTED.

concluding that none of the five intervenor tribes qualified as a successor to a treaty tribe. Pursuant to an appeal by the five tribes from the magistrate's report, Judge Boldt ordered a *de novo* evidentiary hearing in August of 1975, directed the tribes to submit additional evidence in March of 1976, and heard oral argument on the matter in January of 1977.

In February of 1978, Judge Boldt underwent surgery for an aortic aneurysm which occasioned a lengthy period of convalescence. Early in 1979, Judge Boldt asked to be relieved of his judicial duties because of his failing health. On February 16, 1979, two of the three moving tribes in this case requested that Judge Boldt be allowed to resolve the still pending issue of the five intervenor tribes' treaty status. In an order dated March 14, 1979, Chief Judge Walter T. McGovern granted the motion on the grounds that it was "in the best interests of judicial administration and economy, and in the interest of all parties." In a footnote, Judge McGovern stated that "[t]he court has been informed that Judge Boldt is willing, if requested, to consider and issue a ruling on this matter."

Judge Boldt issued his decision on March 23, 1979. In doing so, he adopted with minor changes the proposed findings of fact and conclusions of law submitted by the United States. On April 25, 1979, he issued a brief order denying the tribes' motion for reconsideration. The Ninth Circuit affirmed the decision, 641 F.2d 1368 (1981), and the United States Supreme Court denied the tribes' petition for certiorari. 454 U.S. 1143 (1982).

The Duwamish, Snohomish and Steilacoom Tribes now move to reopen the judgment of March 23, 1979 pursuant to Fed. R. Civ. P. 60(b) (6) for the purpose of conducting discovery into the state of Judge Boldt's mental health at the time he

rendered his decision. The motion is prompted by an article published on June 11, 1992 in the Seattle Post-Intelligencer which states that, according to Judge Boldt's death certificate issued in March of 1984, he suffered the onset of Alzheimer's Disease in 1978, the year before the decision at issue was made. This motion is opposed by the United States, the State of Washington, and numerous other tribes involved in the lengthy litigation over fishing rights in the state of Washington.

II. LEGAL ANALYSIS

A. Applicable Standard

Rule 60 governs relief from judgments and orders of the court. Rule 60(b) (6) provides as follows:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representatives from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

The United States Supreme Court described the operation of this rule in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988):

> Rule 60(b) (6) . . . grants federal courts broad authority to relieve a party from a final judgment "upon much terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in

> clauses (b) (1) through (b) (5). The Rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," while also cautioning that it should only be applied in "extraordinary circumstances."

(Footnotes and citations omitted.) Thus the question here is whether extraordinary circumstances exist in this case such that justice requires reopening Judge Boldt's decision of March 23, 1979. For the following reasons, the court concludes that the tribes' motion should be denied.

B. Factors to be Considered

1. Timeliness

The parties opposing the motion challenge its timeliness, emphasizing that all of the facts now brought to the court's attention about Judge Boldt's failing health and the circumstances surrounding his decision were known in 1979 with the exception of the information on the death certificate issued in 1984. The opposing parties stress that death certificates are matters of public record readily available on request.

While it is true that fifteen years have passed since the decision at issue and ten years since Judge Boldt's death, the court declines to deny the tribes' motion on this ground alone.[2]

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2. Insofar as the tribes seek to conduct discovery about the existence of any *ex parte* communications which may have affected Judge Boldt's (Cont'd)

Appendix C

As the tribes' counsel pointed out, it is not customary for litigants to comb a judge's death certificate in hopes of finding evidence supporting a challenge to the judge's competency at the time he rendered a decision.

2. Public Interest in Finality of Judgments

Even if the moving tribes should not be held strictly accountable for the long delay in challenging Judge Boldt's decision, the court must still take into account the public interest in maintaining the finality of judgments. The law recognizes the need for stability in precedents and *stare decisis*. This case provides an excellent example of the damage that might result if parties to a case and the general public were unable to rely on court judgments.

The passage of time has markedly changed the landscape of this case. For many years now, state-tribal fish management plans have been drawn up and allocation decisions made in reliance on the 1979 judgment. Disturbing the judgment at this late date would prejudice many other parties who have depended on its finality. Moreover, in addition to damaging the interests of the parties in this particular case, there is the unmeasurable danger resulting from a precedent that would encourage parties to reopen judgments for the purpose of questioning judicial competency even long after the events in question.

(Cont'd)
decisionmaking ability, the court finds that this request is untimely. A motion for relief from a final order for reasons of misconduct by an adverse party must be filed within one year after the order was entered. Rule 60 (b) (3). Moreoever, the tribes have no evidence to support the premise that any such *ex parte* communications occurred.

Appendix C

3. Need for Correction of Injustice

But the moving tribes argue that the issue posed by this case brings the need for finality into direct conflict with the quest for justice, and that the need to correct an injustice should outweigh the need for finality. After carefully examining all of the events surrounding this case, the court concludes that, contrary to the moving tribes' contention, it is not confronted with this exceedingly difficult determination because no manifest injustice was done.

The moving tribes do not assert that they were prevented from receiving a full and fair hearing by virtue of being unable to submit relevant evidence or arguments. The record reveals that they were given ample opportunity to submit exhibits, present testimony and file briefs in support of their respective positions. They raise instead the possibility that Judge Boldt may have suffered from a mental impairment at the time he signed the final order of March 23, 1979 which rendered him incompetent to carry out is judicial functions.

But Judge Boldt was not the only judicial officer to review the moving tribes' contentions and reach the same conclusion. On March 7, 1975, Magistrate Robert E. Cooper issued a report setting forth is independent conclusion that none of the moving tribes had established their status as a treaty tribe or the successor to a treaty tribe. This report was based on five days of hearings as well as testimony and evidence submitted by the moving tribes.

More significantly, the Ninth Circuit reached the same result in affirming Judge Boldt's decision on appeal at 641 F.2d 1368 (9th Cir. 1981). The moving tribes stress that the standard of

review in such cases is not *de novo*, and that findings of fact are only reviewed for clear error. But it is apparent from the text of the appellate opinion that the Ninth Circuit did much more than that in this instance.

After reviewing Judge Boldt's decision, the court concluded that the judge had applied the wrong standard in determining whether tribal structure had been maintained. The court went on to explain the proper scope of the inquiry and factors to be considered. Finally, the Ninth Circuit itself reviewed the evidence to determine whether, as a matter of fact, the groups in question had maintained an organized tribal structure since treaty time. The court concluded "[*a*]*fter close scrutiny*, . . . that the evidence supported [the] finding of fact" that they had not done so, and that "the district court correctly resolved this question despite its failure to apply the proper standard." (emphasis supplied) 641 F.2d at 1373, 1374.[3]

Given the language in the Ninth Circuit opinion indicating that the court carefully examined the evidence presented by the moving tribes before deciding to affirm Judge Boldt's findings as correct, this court concludes that the moving tribes have failed to make the kind of showing of manifest error necessary to even consider reopening a judgment so many years after its entry. As the moving tribes acknowledge, the public interest in the finality of judgments is great, particularly in protracted, emotionally charged litigation like *United States v. Washington,* which aroused intense public reaction during the 1970's. Whereas the need for continued reliance on the finality of Judge Boldt's ruling is great, the court can find no countervailing need for disturbing

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3. The United States Supreme Court denied the tribes' petition for certiorari. 454 U.S 1143 (1982).

that finality in order to correct a manifest error because the result does not rest on Judge Boldt's decision alone.

III. CONCLUSION

The court concludes that the moving tribes have failed to demonstrate the existence of any extraordinary circumstances which would warrant reopening the final order of March 23, 1979 for the purpose of conducting discovery into Judge Boldt's mental health. Their motion is accordingly DENIED.

DATED at Seattle, Washington this 23rd day of January, 1995.

s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 11 1997
OFFICE OF THE CLERK

No. 96-1607

In the Supreme Court of the United States

OCTOBER TERM, 1996

DUWAMISH INDIAN TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying a motion, under Federal Rule of Civil Procedure 60(b)(6), for relief from a fourteen-year-old judgment, on the ground that the now-deceased judge may have been suffering from an early stage of a mentally debilitating illness at the time he entered the judgment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 98 F.3d 1159. The opinion of the district court (Pet. App. 22a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1996. A petition for rehearing was denied on January 6, 1997. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the Duwamish, Snohomish, and Steilacoom Indian tribes,[1] seek to reopen a chapter of litigation concerning Indian fishing rights in the State of Washington that began in 1970 and was resolved in 1979.

1. a. In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought an action in the United States District Court for the Western District of Washington against the State of Washington and certain state agencies. The United States sought declaratory and injunctive relief concerning fishing rights of the plaintiff tribes, under a series of treaties in the 1850s, in which Indian tribes had relinquished to the United States their aboriginal rights to land in exchange for the right to take fish in certain areas of the then-Washington Territory. Seven additional tribes intervened as plaintiffs shortly after suit was filed. In 1974, United States District Judge George H. Boldt ruled that all 14 plaintiff tribes had treaty fishing rights that entitled them to take up to 50 percent of the harvestable fish on runs passing through their traditional off-reservation fishing grounds. *United States* v. *Washington*, 384 F. Supp. 312, 327-423 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Pet. App. 5a & n.1, 23a-24a. Judge Boldt's ruling met substantial resistance from the State and

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[1] Although we use the term "tribe" to refer to each of the three petitioners, we use that term in a generic manner, not to suggest that petitioners constitute tribes in the legal or political sense. See *United States* v. *Washington*, 476 F. Supp. 1101, 1104 n.1 (W.D. Wash. 1979), aff'd, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

spawned other lawsuits that ultimately reached this Court, where Judge Boldt's interpretation of the treaties was affirmed. *Id.* at 5a-6a n.3; see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

b. Meanwhile, shortly after Judge Boldt's 1974 decision, five additional Indian groups, including the three petitioners herein, moved to intervene as plaintiffs, contending that they also are tribes entitled to rights under the treaties. On September 13, 1974, Judge Boldt referred the matter to a magistrate judge to analyze the status, under the treaties, of the five intervenors. Pet. App. 6a. After receipt of evidence and a hearing, the magistrate judge issued a report on March 5, 1975. The magistrate judge concluded that none of the five intervenors qualified as a treaty tribe and recommended a conclusion of law that none of them had fishing rights under the treaties at issue. *Id.* at 7a.

The five intervenors appealed to Judge Boldt from the magistrate judge's report. Judge Boldt held a de novo evidentiary hearing during three days in 1975, then directed the parties to submit additional evidence in 1976, and heard oral argument in 1977. Pet. App. 7a.

While the matter was under submission, Judge Boldt underwent surgery for an aortic aneurysm in February 1978. He informed counsel in July 1978 that he was not yet fully recovered, but expected to rule on the matter within the next several months. Pet. App. 7a. On February 7, 1979, however, Judge Boldt notified counsel that, because of his failing health, he had requested that the chief judge remove him from the case. Four of the five intervenors, including two petitioners herein, filed a motion requesting that Judge

Boldt decide the question whether they qualify as treaty tribes with respect to fishing rights. *Ibid.* The chief judge granted the motion on March 14, 1979, noting that it was in the best interests of judicial administration, economy, and the interests of all parties, and that Judge Boldt had indicated that he would be willing to consider and rule on the matter. *Ibid.*

On March 23, 1979, Judge Boldt issued his decision, ruling that the five intervenors do not have fishing rights under the treaties at issue. *United States* v. *Washington*, 476 F. Supp. 1101, 1102-1111 (W.D. Wash. 1979), aff'd, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982). In doing so, he adopted, with minor changes, the proposed findings of fact and conclusions of law that had been submitted by the United States. Pet. App. 7a-8a. Judge Boldt subsequently denied the five intervenors' motion for reconsideration. *Id.* at 8a.

c. The court of appeals affirmed Judge Boldt's ruling rejecting the treaty fishing-right claims of the five intervenors. *United States* v. *Washington*, 641 F.2d 1368 (9th Cir. 1981). As a threshold matter, the court noted that Judge Boldt had adopted the United States' proposed findings and conclusions without substantial change. *Id.* at 1371. It stated that such verbatim adoption is disfavored and "calls for close scrutiny by an appellate court," although "findings still must be upheld unless clearly erroneous." *Ibid.*

The court of appeals rejected the legal standard that Judge Boldt had indicated was decisive in determining whether the intervenors had treaty-tribe status, and it found that, although Judge Boldt mentioned other considerations that were relevant, they did "not adequately define the controlling principles."

641 F.2d at 1372. Therefore, the court of appeals proceeded to determine the correct legal principles that should govern the case. *Id.* at 1372-1373.

After having announced the controlling law, the court of appeals undertook to examine the record in the case to determine whether the result reached by the district court was correct despite the erroneous legal analysis thereunder. 641 F.2d at 1373-1374. "After close scrutiny," the court of appeals concluded that the record evidence supported the district court's finding of fact that, since treaty times, the five intervenors had not functioned as "continuous separate, distinct and cohesive Indian cultural or political communit[ies]." *Id.* at 1373. The court therefore concluded that "the district court correctly resolved th[e] question [of maintenance of tribal structure] despite its failure to apply the proper standard," and affirmed the district court judgment. *Id.* at 1374.[2]

This Court denied review. 454 U.S. 1143 (1982).

2. a. Judge Boldt passed away on March 18, 1984. His death certificate lists pneumonia as the immediate cause of death, and Alzheimer's disease as a secondary cause. According to the death certificate, the onset of Alzheimer's was six years earlier. Pet. App. 8a; C.A. Exc. Rec. 30.[3]

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[2] In a dissenting opinion, Judge Canby disagreed with the panel majority's analysis of the legal significance of the district court's factual findings, and he analyzed those findings in detail. 641 F.2d at 1374-1376. Judge Canby stated that he would have remanded the matter to the district court for further findings. *Id.* at 1376.

[3] The death certificate indicates that no autopsy was performed. Accordingly, it is impossible to say with certainty that the judge actually had Alzheimer's disease at the time of

More than nine years after the judge's death, more than fourteen years after entry of judgment, and almost one and one half years after publication of a newspaper article about the judge's health (see note 3, *supra*), petitioners filed a motion, under Federal Rule of Civil Procedure 60(b)(6), for relief from the 1979 judgment. Pet. App. 9a, 24a-25a. The United States, the State of Washington, and various Indian tribes that had been involved in the extensive litigation over the treaty fishing rights, opposed the motion. *Id.* at 25a. At oral argument a year later, petitioners asserted that the motion was for the limited purpose of conducting discovery into the judge's mental health at the time of the entry of judgment, but the record did not reflect that petitioners had filed any motion for discovery during the elapsed year. *Id.* at 9a.

b. The district court denied relief. Pet. App. 22a-30a. Relying on *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988), the court recognized that relief from judgment under Rule 60(b)(6) should be granted only in "extraordinary circumstances" that require relief to correct injus-

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his death in 1984, let alone in 1979. See C.A. Supp. Exc. Rec. 3 (Guy McKhann, M.D., et al., *Clinical diagnosis of Alzheimer's disease: Report of the NINCDS-ADRDA Work Group under the auspices of Department of Health and Human Services Task Force on Alzheimer's Disease*, 34 Neurology 939 (1984)).

Petitioners contend that they became aware of the contents of the judge's death certificate only in June 1992 when a newspaper reported that, at the time of the 1979 ruling, Judge Boldt suffered from Alzheimer's disease. Pet. App. 8a. The article also relied on statements by the judge's son regarding the time of onset, but the son stated that he believed his father to have been mentally competent when he entered the ruling against petitioners in 1979. *Id.* at 8a-9a.

tice. Pet. App. 25a-26a. The court examined the factors of timeliness, public interest in finality of judgments, and need for correction of injustice. It rejected petitioners' contention that the court had to make the "exceedingly difficult determination" of how to resolve a direct conflict between a need for finality and a need to correct an injustice. Rather, "[a]fter carefully examining all of the events surrounding this case," the court concluded that "no manifest injustice was done." *Id.* at 28a.

The court reviewed the record and concluded that petitioners had not been prevented from submitting any evidence or arguments for judicial consideration when the district court ruled on their treaty status. And, the court observed, petitioners' reliance on the suggestion that Judge Boldt may have suffered from a mental impairment at the time he signed the final order in 1979 ignored the fact that he was not the only judicial officer to have reviewed petitioners' contentions and to have reached the same conclusion. The court pointed out that, after five days of hearings and review of testimony and evidence, the magistrate judge had reached the same conclusion that Judge Boldt subsequently did. Pet. App. 28a. "More significantly," the court emphasized, the court of appeals panel that reviewed Judge Boldt's judgment on direct appeal reached the same result based on an analysis that constituted more than a review for clear error. *Id.* at 28a-29a. The court concluded that, "[g]iven the language in the Ninth Circuit opinion indicating that the court carefully examined the evidence presented by the moving tribes before deciding to affirm Judge Boldt's findings as correct," petitioners "failed to make the kind of showing of manifest error necessary

to even consider reopening a judgment so many years after its entry." *Id.* at 29a.

c. The court of appeals affirmed. Pet. App. 1a-19a. It held that the district court had not abused its discretion in denying petitioners' Rule 60(b)(6) motion. The court concluded that "[t]his is not one of those rare cases where 'extraordinary circumstances' warrant vacating an 'erroneous judgment.'" Pet. App. 11a (quoting in part *Liljeberg*, 486 U.S. at 864, and *United States* v. *Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir.), cert. denied, 510 U.S. 813 (1993)). The court noted that the record indicated that Judge Boldt had remained aware of his obligation to decide petitioners' treaty status, such that he had asked to be removed from the case when he felt that his physically weakened condition would not permit him to decide the matter within several months as anticipated. Pet. App. 11a. Four of the five intervenors, including two petitioners, nonetheless had requested that Judge Boldt decide the issue, and the judgment from which petitioners now seek relief resulted from the court's granting that request. *Id.* at 7a, 11a. The court also emphasized that a magistrate judge and the court of appeals itself had closely examined the case and reached the same conclusion as Judge Boldt. *Id.* at 12a.[4]

In a concurring opinion, Judge Kozinski reached the same result via a different analysis. He concluded that Rule 60(b)(6) would not have authorized the

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[4] In closing, the court indicated that "[a] decision whether Rule 60(b)(6) gives the district court the power to correct a manifest injustice arising from a judge's disability should await the extraordinary circumstances in which it might be presented." Pet. App. 12a.

district court to grant petitioners relief from judgment, even if Judge Boldt had been mentally disabled at the time of entry of judgment, because Rule 60(b)(6) authorizes relief only where relief would have been available at the time of the entry of judgment. In Judge Kozinski's view, petitioners would not have been able to have Judge Boldt removed from the case at the time of the entry of judgment had they been aware of a mental disability while he was presiding over their case, because there is no statutory basis for requiring a judge to recuse himself on grounds of mental disability. Pet. App. 13a-16a (discussing statutes and case law). The only recourse would have been to complain to the circuit judicial council through a separate, quasi-adjudicative proceeding. *Id.* at 14a (citing 28 U.S.C. 372(c)).

Judge Kozinski concluded, however, that the panel majority's erroneous assumption regarding the scope of Rule 60(b)(6) was offset because it nonetheless denied relief based on its determination that the district court did not abuse its discretion by denying petitioners discovery. In Judge Kozinski's view, although that ruling led to the correct result, it too was erroneous because, if mental disability were a basis for setting aside a judgment under Rule 60(b)(6), petitioners had made a showing sufficient to justify discovery. *Id.* at 16a-17a.

ARGUMENT

1. Petitioners assert (Pet. 2, 18) that "[t]he fundamental question in this case is whether a litigant is entitled to relief from a judgment if the district court judge lacked mental competence at the time he issued his decision." They contend (*id.* at 11-14) that the court of appeals' opinion does not comport with the

Court's due process jurisprudence regarding the right to a fair trial and to a competent and impartial trier of fact. They urge (*id.* at 14) the Court to "confirm for the first time" a due process right to a competent judge. They also contend (*id.* at 14-16) that the panel majority's refusal to enforce that right is inconsistent with this Court's rulings regarding the availability of relief under Federal Rule of Civil Procedure 60(b)(6) to effectuate due process rights.

The court of appeals' panel majority did not address the question presented by petitioners. Rather, it assumed, *arguendo*, that the due process right asserted by petitioners exists. Moreover, it assumed that relief for violation of that right would be available under Rule 60(b)(6) in certain circumstances. The court of appeals concluded, however, that, in the particular circumstances of this case, the district court had not abused its discretion in determining that petitioners had not made a sufficient showing to warrant such relief. See Pet. App. 11a-12a.

Consequently, contrary to petitioners' suggestion (Pet. 11-14), the decision below does not implicate important due process issues warranting review by this Court. Petitioners' true complaint regarding treatment of the due process claim below is with the rationale of the concurring opinion. That opinion (Pet. App. 12a-19a) did address the question presented by petitioners and reached a conclusion contrary to that urged by petitioners. That reasoning was based on the view that Rule 60(b)(6) would not authorize relief from judgment based on evidence regarding mental impairment of a judge because such impairment cannot be used to seek a judge's recusal at the time of judgment or on direct appeal. *Id.* at 13a-16a. Rather, in the view of the concurring opinion,

recourse in such instances must be made to the circuit judicial council. Pet. App. 14a (citing 28 U.S.C. 372(c)).

Petitioners do not demonstrate, however, that if review were granted, the question of whether post-judgment relief is ever available based on alleged mental impairment of the judge, would even be reached by this Court. Rather, as the court of appeals panel majority reasoned, failure to find that petitioners suffered an injustice resolves the case under Rule 60(b)(6). Because it assumed that Rule 60(b)(6) relief would be available based on a judge's mental disability under certain circumstances, the panel majority's ruling does not present any conflict with the due process right that petitioners derive from this Court's jurisprudence. Indeed, the court of appeals (as well as the district court) relied upon, and reached a result consistent with, the authority cited by petitioners (Pet. 14-15) regarding Rule 60(b)(6). See Pet. App. 11a (quoting in part *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988)); *id.* at 25a-26a (district court's citation to *Liljeberg*).

The court of appeals weighed the considerations identified by the Court and cited by petitioners as relevant to a Rule 60(b)(6) determination. See Pet. 15; Pet. App. 10a-12a; see also *id.* at 26a-30a (district court's weighing of factors). The court of appeals (as well as the district court) simply viewed the circumstances of the case differently than do petitioners and, under the legal analysis urged by petitioners, found that the balance between likely injustices warranted denial of relief. That determination does not warrant further review. Moreover, as the court of appeals stated, consideration of the question of whether relief

from judgment would be available upon a showing of incompetence and injustice should await a case, unlike this one, that involves the extraordinary circumstances in which that question might be presented. See Pet. App. 12a.[5]

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[5] Even if it were likely that the Court would reach the question of whether relief is ever available under Rule 60(b)(6), petitioners do not demonstrate that it warrants review. Petitioners rely (Pet. 11-12 & n.4) on cases that emphasize the importance of judicial impartiality. Also, in *Bracy* v. *Gramley*, No. 96-6133, 1997 WL 303400 (June 9, 1997), the Court recently held that a habeas petitioner had made a sufficient factual showing to establish good cause for discovery on a claim of judicial bias in a death penalty case. The Court emphasized that there was extensive evidence in that case to rebut the presumption that the judge properly discharged his official duties, because the judge in that case had been convicted on corruption charges and the allegation was that he was actually biased against petitioner in his particular case as well. The issues presented in cases such as that—judicial bias, partiality and financial interest—all go to factors that are relevant to the disqualification of judges under 28 U.S.C. 455, whereas mental impairment is not. Also, as petitioners acknowledge, in *Slayton* v. *Smith*, 404 U.S. 53 (1971), the one case involving an allegation that a judge suffered from senility at the time of sentencing, the Court disposed of the case on grounds of failure to exhaust state remedies in habeas proceedings, without reaching the merits of the issue.

Petitioners also rely (Pet. 12) on cases concerning the disqualification of jurors because of lack of mental capability. The considerations relating to disqualification of jurors and judges are different, however, as can be seen from a comparison of 28 U.S.C. 1865(b)(4)("mental or physical infirmity" may be grounds for juror disqualification) with 28 U.S.C. 144 and 455 (no mention of mental or physical infirmity among grounds specified for disqualification of judges). And in the juror cases involving post-verdict evidence of possible juror incompetency, courts "have refused to set aside a verdict, or even to make

2. Petitioners contend (Pet. 16-18) that the Court should grant review because the court of appeals disregarded the important fact-finding role of a district court judge.

The court of appeals' reliance on the fact that Judge Boldt's ruling was consistent with the conclusion of the magistrate judge, and was upheld after "close scrutiny" by the court of appeals, does not denigrate the importance of the district court's fact-finding role. It simply reflects that courts, in response to a Rule 60(b)(6) motion, must consider "the risk of injustice to the parties in the particular case," along with "the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. at 864. The fact that other judges had carefully scrutinized petitioners' claims and found them meritless reduces the risk of possible injustice, and is an appropriate factor to weigh in determining whether to grant relief under Rule 60(b)(6).

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further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance . . . of jury service," or proof of "a closely contemporaneous and independent post-trial adjudication of incompetency." *Tanner* v. *United States*, 483 U.S. 107, 119 (1987) (quoting *United States* v. *Dioguardi*, 492 F.2d 70, 80 (2d Cir.), cert. denied, 419 U.S. 873 (1974)); see *Dioguardi*, 492 F.2d at 80 nn. 13 & 14 (collecting cases). There was no such adjudication here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1996

DUWAMISH INDIAN TRIBE, SNOHOMISH INDIAN TRIBE and STEILACOOM INDIAN TRIBE,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE TULALIP TRIBES, MUCKELSHOOT TRIBE, THE NISQUALLY TRIBE, THE PUYALLUP TRIBE AND SQUAXIN ISLAND TRIBE

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QUESTION PRESENTED FOR REVIEW

May a 16-year-old judgment be reopened on unsubstantiated allegations concerning the mental capacity of a district court judge, where that judgment was independently confirmed on appeal and where no allegations that the record below was insufficient have been made?

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STATEMENT OF THE CASE

In the court below, three organizations calling themselves Indian tribes, the Snohomish, Steilacoom, and Duwamish ("three petitioners"), pursuant to Federal Rule of Civil Procedure 60(b) sought to reopen a judgment in *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979) (*Five Tribes Case*), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). They had originally sought intervention in the massive litigation involving Indian treaty rights *United States v. Washington, et al.* (Civ. No. 9213, W.D. Wash.). The judgment they appealed from determined that they were not successors in interest to certain treaty signatories who had signed treaties with the United States government in 1854 and 1855. Nor were these organizations politically recognized by the federal government as Indian tribes. That judgment is supported by the tribes signatory to this brief.

The three petitioners here had neither standing nor substantive rights on which to base participation in the original litigation. Other federally recognized tribes have been found to be the successors in interest to the treaty signatories bearing the tribal names of petitioners. The Tulalip Tribes, plaintiff-intervenors below and respondents here, are the present-day successors in interest to the Snohomish Tribe. *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978); 626 F. Supp. 1405, 1527 (W.D. Wash. 1985). The Nisqually Tribe has been held to be a successor-in-interest to the Steilacoom Tribe at Treaty Times. *United States v. Washington*, 384 F. Supp. 312 at 368 (W.D. Wash. 1974). The Puyallup Tribe also exercises treaty fishing rights in areas known to be claimed by the so-called Steilacoom Tribe. *See United States v. Washington*, 626 F. Supp. 1404, 1441 (W.D. Wash. 1985).

These petitioners sought to reopen the final judgment below to determine whether the Honorable George Boldt, the trial judge

in this case at the time — now deceased — was mentally impaired when he signed the findings and conclusions of law in the case. They alleged no specific errors in the decision nor did they present newly discovered evidence on the merits. They provided no evidence concerning the trial judge's competence other than a newspaper article and a death certificate. Their request to reopen was denied by the district court for a number of persuasive reasons.

Noting that fifteen years had passed since Judge Boldt's decision, the court held that the three petitioners had failed to demonstrate the existence of any extraordinary circumstances that would warrant reopening the final order. Three main reasons were noted:

> First, the courts should avoid disturbing the public interest in the finality of judgments;
>
> Second, a ruling for the petitioners would open the floodgates to future challenges to judgments on grounds of judicial incompetence; and
>
> Third, the tribes had suffered no manifest injustice because the magistrate judge in the Ninth Circuit reached the same conclusion as the District Court judge.

United States v. Washington, 95-35202 (9th Cir. Oct. 23, 1996 opinion) (pp. 9a-10a of Appendix A to Petitioner's Petition for Writ of Certiorari.)

Noting that it should use Rule 60(b)(6) sparingly as an equitable remedy, the Ninth Circuit upheld the District Court's ruling and found no abuse of discretion in denying the petitioner's motion to reopen the judgment below. *Id.* p. 11a.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' STATUS HAS BEEN JUDICIALLY DETERMINED AND THEY HAVE RECEIVED DUE PROCESS.

The main thrust of the petition for certiorari is the claim that these groups have been denied due process. (Petitioners' Petition for a Writ of Certiorari, April 7, 1997. p. 4). These three groups have already had numerous bites of the apple concerning their status and sought yet one more below. In 1974, alleging treaty rights, the three petitioners, plus a group calling themselves "Snoqualmie," were allowed to intervene in *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Sept. 13, 1974 Order, Docket No. 772). It is important to note that these "groups" were not legally or politically "Indian tribes" as recognized by United States law. They were merely groups of individuals who may or may not be able to trace racial bloodlines to certain individuals who would be deemed, anthropologically, to have been "members" of certain aboriginal groups in the mid-1850's.

The petitioners constantly "bootstrap" their position with questionable statements. The extent of this bootstrapping is well illustrated by footnote 7 of their Petition. (Petitioners' Petition for a Writ of Certiorari, April 7, 1997, n. 7, p. 16). In that footnote, they make a number of incorrect statements. For example, they state that it was not until February 1978 that Judge Boldt was "diagnosed with Alzheimer's." Of course, there is no evidence that Judge Boldt was ever actually diagnosed with Alzheimer's. That allegation is based solely on a newspaper article and a death certificate signed many years later by an attending physician who has not been shown to have any

knowledge of Judge Boldt's condition in 1979. Further in that footnote, the petitioners opine that they did not have the opportunity to observe Judge Boldt until many years later, when they learned of his alleged Alzheimer's and the "likely reason" for his "otherwise inexplicable ruling."

Why petitioners consider his ruling inexplicable is itself inexplicable. The ruling of the district court followed the ruling of the magistrate judge who heard the case originally. The decision to allow Judge Boldt to continue with the case was made by the senior Judge McGovern of the district. The case was then given "close scrutiny" and a decision made by the Ninth Circuit. The only thing inexplicable about this entire controversy is petitioners' inexplicable ability to accept the finality of a judgment. Judge Boldt's ruling was entirely rational given the magistrate judge's original decision, the decision of the senior judge of the district to having decide the case, and its ultimate affirmance after "close scrutiny" by the Ninth Circuit.

That petitioners have received substantial due process is illustrated by the determinations in this case which are set out below.

A. Determination By The Special Master.

On September 13, 1974, Senior United States District Judge George Boldt referred the issue of the treaty status of petitioners to Federal Magistrate Judge Robert E. Cooper sitting as a special master. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (Sept. 13, 1974 Order Referring, Docket No. 772). Magistrate Judge Cooper had extensive judicial experience as a federal magistrate. He continued to hear matters referred to him in the continuing fishing rights case thereafter for many years. After full consideration and five days of hearings, Magistrate Judge Cooper determined that the three petitioners

were not treaty successors. He made recommended findings of fact to support that determination. Masters' Report . . . , March 5, 1975, *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (March 5, 1975 Master's Report, Docket No. 772).

B. Determination By The Trial Court.

Not satisfied with the result, petitioners then appealed to District Court Judge George Boldt who ordered a *de novo* evidentiary hearing after receiving the master's report. *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Aug. 7, 1975 Order, Docket No. 1245). He allowed all evidence submitted before the master to be considered by the district court, and allowed substantial additional evidence to be submitted. A three-day trial was held in October of 1975 at which written evidence was submitted and live testimony was taken. *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Oct. 28, 29 and 30, 1975 Transcripts of hearings). After reviewing the record, Judge Boldt directed the three petitioners to submit additional evidence, *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Mar. 19, 1976 Order, Docket No. 1966), and heard oral argument on January 7, 1977. After that hearing, he allowed the submission of even more written evidence and the submission of proposed findings by all parties.

Early in 1979, before rendering a final decision, Judge Boldt announced that he had asked to be relieved of judicial duties because of failing health. On February 16, 1979, two of the three petitioners requested that Judge Boldt be allowed to resolve the *Five Tribes Case. United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Motion of Samish, *et al.*, Feb. 16, 1979, Docket No. 5619). Then Chief Judge Walter T. McGovern took the matter under advisement and granted the motion. The Chief Judge determined that it was "in the best interests of judicial administration and economy, and in the interest of all parties,"

that Judge Boldt undertake the task, noting that the judge was willing to do so.[1] The assignment was pursuant to 28 U.S.C. § 294(c) which allows retired judges to be assigned judicial duties they are "able to undertake." Judge Boldt accepted the assignment and issued the *Five Tribes* decision, also concluding that the three petitioners were not successors in interest to treaty signatories and were not entitled to exercise rights under any Indian treaty. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (Mar. 23, 1979 Order, Docket No. 5726).

In making his decision, Judge Boldt generally accepted the proposed findings and conclusions of the United States, which were consistent with the proposed findings of Magistrate Judge Cooper. However, he critically reviewed the proposed findings, making interlineations, deletions, and substitutions.[2] He corrected additional items two weeks later.[3]

The three petitioners herein then moved for reconsideration. After review, the court denied that motion three weeks after its earlier corrections.[4]

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1. Order Allowing Judge George H. Boldt to Resolve Certain Pending Matters Within *United States v. Washington*, Civ. No. 9213, W.D. Wash., March 14, 1979 (*United States v. Washington*, Civ. 9213 (W.D. Wash., 1970, Docket No. 5700)).

2. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (Findings of Fact, Conclusions of law and Decree re treaty Status of Intervenor Duwamish, Samish, Snohomomish, Snoqualmie and Steilacoom Tribes Mar. 23, 1979, Docket No. 5726). Judge Boldt's corrections appear at p. 3, ll. 8, 30; p. 4, l. 19; p. 5, l. 14; and p. 16, l. 7.

3. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (April 4, 1979 Minute Order, Docket No. 5753).

4. *United States v. Washington*, Civ. 9213 (W.D. Wash., 1970) (April 25, 1979 Order Denying Motion for Reconsideration, Docket No. 5802).

C. Determination By The Court of Appeals.

The three petitioners then appealed to the Ninth Circuit which affirmed the decision after giving it "close scrutiny." 641 F.2d 1368, 1371 (9th Cir. 1981). It is important to note that the Ninth Circuit did not simply engage in a *pro forma* review and affirmance of Judge Boldt's decision. First, the court noted that adoption of proposed findings "without substantial change" was "ordinarily disfavored." *Id.* Thus, said the court, it must give the matter "close scrutiny." *Id.*

Second, the court noted that the district court had applied a wrong legal standard (*i.e.*, that federal recognition or nonrecognition was decisive). It ruled that the correct legal standard involved whether the entity maintained a "cohesive Indian cultural or political" community. It went on to examine the record in detail to determine whether the district court reached the correct result in light of that standard. *Id.* at 1372. It found the trial court result correct and noted that the factual finding that the petitioners had not functioned since treaty times as "continuous, separate, distinct and cohesive Indian cultural or political communit[ies]" was central to the proper legal theory concerning maintenance of an organized tribal structure. The Ninth Circuit independently reviewed the record and "after close scrutiny" concluded "that the evidence supports this finding of fact." *Id.* at 1373.

The Ninth Circuit decision, is an independent judicial determination on the merits of petitioners' case. The alleged incapacity of the trial judge becomes irrelevant since the Court of Appeals reviewed the trial record and made an independent decision. There is no allegation of any error in the development of the trial record.

A petition for rehearing before the Ninth Circuit was denied.

On January 11, 1982, the United States Supreme Court denied the petitioners' petition for certiorari. 454 U.S. 1143 (1982).

D. Subsequent Litigation: *Greene v. Lujan.*

In addition, collateral attacks have been made on the judgment involved here. Petitioners have continued the press for recognition as tribes through the federal tribal acknowledgment process. *See* 25 C.F.R. § 83. Because of an adverse decision in that process, on May 5, 1989, the Samish, one of the five organizations (including the three petitioners herein) who had originally sought intervention in the case, brought suit in federal district court for the Western District of Washington alleging that the Bureau of Indian Affairs' review of their petition for recognition pursuant to the acknowledgment process had been mishandled and, in addition, that they should be entitled to treaty fishing rights. *Greene, et al. v. Lujan* (W.D. Wash., Cause No. 89-CV-645Z).

In that case, the Samish argued that federal regulations concerning recognition were unconstitutional. The district court rejected that notion, ruling that the regulations were not unconstitutional on their face. *See* Order of Feb. 25, 1992, p. 2, ll. 16-19 (W.D. Wash., Cause No. 89-CV-645Z, Docket No. 169). The court did however find that the plaintiffs had a property interest in their status as a recognized tribe and were therefore entitled to a formal adjudication under the Administrative Procedures Act. *Id.*, p. 3, ll. 15-18.

As to the Samish attempts to relitigate the issue as to whether or not they were a successor in interest to the Treaty of Point Elliott and entitled to fishing rights, the court held that they were barred under the doctrine of *res judicata* from relitigating that status, and that "plaintiffs, therefore, have no rights under the Treaty of Point Elliott." Order of Feb. 25,

1992, p. 5, ll. 2-4 (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 169). The court went on to hold that the issue of treaty status had been resolved in *United States v. Washington*, that it was binding in this case, and that "treaty issues cannot be relitigated." *Id.*, p. 7, ll. 16-26. *See also Greene, et al. v. United States, et al.*, 996 F.2d 973, 975 (9th Cir. 1993).

On June 19, 1992, the plaintiffs in *Greene* moved to set aside the original judgment in *United States v. Washington* under Fed. R. Civ. P. 60 on the grounds that the trial judge *might* have suffered a mental disability at the time he signed the final findings in the case. Motion to Set Aside . . . , June 19, 1992, *Greene, et al. v. Lujan* (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 184).

At a hearing held September 18, 1992, the Honorable Thomas S. Zilly, United States District Judge, denied the plaintiffs' motion. In that proceeding, Judge Zilly noted that there were a number of reasons why the motion should not be brought in his court as opposed to the ongoing litigation of *United States v. Washington*. In addition, he noted that when Judge Boldt originally considered these issues:

> . . . there were numerous hearings that were conducted. He appointed a special magistrate to consider and receive evidence. He gave notice to the Samish and other tribes that they could present additional evidence. He alerted the Samish and the total of five tribes, I believe, that there were factors which suggested that they would not be given recognition. The Samish submitted substantial additional evidence that was considered by the judge. The judge then after many months of deliberations and after

> several hearings made his findings, which were affirmed by the Ninth Circuit after careful scrutiny by that court.

Greene, et al. v. Lujan (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 184, Transcript of September 18, 1992, p. 38 thereof).

Subsequently, judgment on these issues was entered. *See* Order of Oct. 16, 1992, *Greene, et al. v. Lujan* (W.D. Wash. Cause No. 89-CV-645Z, Docket No. 217, Transcript of September 18, 1992, p. 38 thereof).

The Snohomish, Steilacoom, and Duwamish, petitioners in this case, then sought relief from the 1979 judgment in the proceedings below, using the arguments previously advanced by the Samish tribe in *Greene*.

The goal of these organizations to reopen the judgment and intervene in this case is to be allowed to exercise treaty fishing rights. However, the descendants of the Tribal signatories representing the Snohomish, Steilacoom and Duwamish have *already* been recognized as possessing treaty rights through their respective successors in interest. For example, the Tulalip Tribes, intervenors herein, are the present-day successors in interest to the Snohomish tribe. *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978); 626 F. Supp. 1405, 1527 (W.D. Wash. 1985). Thus, Snohomish people who enroll at Tulalip may exercise their treaty rights through The Tulalip Tribe, a federally recognized tribe. The Nisqually Tribe has been held to be a successor-in-interest to the Steilacoom Tribe at Treaty Times. *United States v. Washington*, 384 F. Supp. 312 at 368 (W.D. Wash. 1974). The court noted that the Indians who were assigned to the Nisqually Reservation included those identified in the Treaty Preamble as Steilacoom, and that they were thereafter

"known as Nisqually Indians and were dealt with by the United States as a separate collective entity." *United States v. Washington*, 384 F. Supp. 312 at 368.

The petitioners make it clear that they want to independently attempt to exercise fishing rights if allowed to reopen and retry the case rather than work through established tribal organizations. *See* Appellants' Memorandum of Points and Authorities, May 25, 1994, p. 2, n. 2, *United States v. Washington* (Civ. No 9213, W.D. Wash., Subproceeding No. 93-2, Docket No. 43).

E. Rule 60(b) Mandated Dismissal Of Petitioners' Motion.

Federal Rule of Civil Procedure 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation

> of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

The court below correctly applied the rule to this situation.

II.

STANDARDS UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6).

Petitioners appeared to primarily rely on subdivision (b)(6) of the rule in the district court. Only "extraordinary circumstances" justify relief from judgment under Rule 60(b)(6). *Ackermann v. United States*, 340 U.S. 193, 212 (1950) (litigant's choice not to appeal because of perceived financial sacrifice not enough under Rule 60(b)(6)); *see Klapprott v. United States*, 335 U.S. 601 (1949) (Rule 60(b)(6) relief justified where defendant was sick, poor, and in prison when default judgment entered against him). No extraordinary circumstances exist here, and the public interest outweighs the interests of the three petitioners.

The petitioners had a full and fair opportunity to litigate their claims and do not allege otherwise. *Cf. Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971) (collateral estoppel standards). They have had at least three independent judicial determinations of their status. First by Federal Magistrate Judge Cooper, second by District Judge Boldt, and third by the Ninth Circuit Court of Appeals.

Further, knowing of Judge Boldt's request to be relieved of further duties, the Snohomish and Steilacoom petitioners chose

to have him decide their case. *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970) (Feb. 16, 1979 Motion filed by Petitioner, Docket No. 5619). That action was approved by Senior District Judge McGovern. They freely took the risk that the decision might be adverse to them. "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann*, 340 U.S. at 198.

III.

FOLICIES FAVORING THE FINALITY OF JUDGMENTS WEIGH AGAINST REOPENING THE JUDGMENT IN THE *FIVE TRIBES CASE.*

The three petitioners say that Judge Boldt's adoption of most of the United States' proposed findings without change is an "extraordinary fact" that demonstrates his reasoning was impaired and supports reopening the judgment under Rule 60(b)(6). But, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985); *see* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous"). In this case the Ninth Circuit held that Judge Boldt's findings were not clearly erroneous, 641 F.2d at 1374. It also independently determined that key findings were correct. *Id.* at 1373. The Supreme Court denied certiorari. 454 U.S. 1143 (1982). Judge Boldt's signing of findings proposed to him by a prevailing party, with only minor changes, is not an "extraordinary fact" to justify reopening a final judgment.

The public and especially the parties in this case have an interest in the finality and certainty of judgments, especially where interests of those other than the litigants are at stake. *See*

Cardinal Chem. Co. v. Morton Int'l., Inc., 508 U.S. 83 (1993) (public interest in finality of patent litigation). Here, there have been substantial proceedings since the 1979 decision. For example, the courts have approved state-tribal fish management plans and decided allocation issues in reliance on the 1979 judgment. *E.g.*, 626 F. Supp. at 1527 (order approving 1985 Puget Sound Salmon Management Plan); 626 F. Supp. at 1471-83 (orders approving agreements between the Tulalip Tribes and other tribes). It is not in the public interest to reopen the 1979 judgment as the three petitioners suggest.

IV.

POLICIES TO PRESERVE THE INTEGRITY OF THE JUDICIAL PROCESS WEIGH AGAINST REOPENING THE JUDGMENT.

Courts must also weigh "the risk of undermining the public's confidence in the judicial process" in determining whether to grant relief under Rule 60(b)(6). *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). Here, the three petitioners say that the *possibility* that Judge Boldt *might* have been suffering from Alzheimer's disease in 1979 is an "extraordinary fact" justifying relief under Rule 60(b)(6). The only "fact" is a "possibility." If speculation about the "possibility" that a judge's mental capacity was impaired were a basis for reopening judgments grounded on findings of fact which are clearly not erroneous, then any judgment could be suspect. That would certainly "undermin[e] the public's confidence in the judicial process" and invite public ridicule of private deliberations of federal judges.

A judgment is not defective merely because the judge who rendered it has retired because of a permanent disability. *Boomhower, Inc. v. American Auto. Ins. Co.*, 220 F.2d 488,

490-91 (D.C. Cir.), *cert. denied*, 350 U.S. 833 (1955). Any retired judges, including those who have retired for health reasons, may be assigned judicial duties if they are willing and able to perform them. *Id.*; 28 U.S.C. § 294. That procedure was followed in this case below. *United States v. Washington* (Civ. No. 9213, W.D. Wash., Order, March 14, 1979, Docket No. 5700). The Chief Judge of the court made a determination that Judge Boldt was willing and able to make a ruling. Granting the three petitioners' motion would presume, without foundation, that the decision of the Chief Judge was wrong.

The three petitioners cite *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) as supporting their petition. (Petitioner's Petition for a Writ of Certiorari, April 7, 1997, p. 14). In *Liljeberg*, a judge had violated 28 U.S.C. § 455 by hearing a case in which he had a financial interest. Vacating the judgment was appropriate there because an appearance of partiality undermines the integrity of the judicial process: Due process requires an impartial decision-maker. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). But Judge Boldt did not violate any law, and the three petitioners got all the process they were due. Indeed, as we have noted above, they received substantial due process. *Liljeberg* does not support petitioners' case.

The Judgment Is Correct As A Matter Of Law

The Ninth Circuit affirmed the lower court's original 1979 decision after giving it "close scrutiny," 641 F.2d 1368, 1371 (9th Cir. 1981). It did not simply engage in a *pro forma* review but announced the correct legal standard to be applied and independently examined the record in detail to determine whether the district court reached the correct result in light of that standard. *Id.* at 1372. After reviewing the record and "after close scrutiny" the circuit court concluded "that the evidence supports the key finding of fact concerning the status of appellants." *Id.* at 1373.

The Ninth Circuit decision is an independent judicial determination on the merits of petitioners' case and is the law on this matter. The alleged incapacity of the trial judge at a late stage of the trial proceedings, after proper and fair development of a full record, is irrelevant.

The Three Petitioners' Motion Below Was Untimely

The three petitioners asked the court below to allow them to conduct discovery on "the existence of any impermissible *ex parte* communications by any individuals which may have affected Judge Boldt's ability to make a competent decision." Appellants' Memorandum of Points and Authorities, served on counsel November 22, 1993, unsigned and undated, p. 6, ll. 5-8, *United States v. Washington,* Civ. 9213 (W.D. Wash., 1970). Although petitioners claim their motion is brought under subdivision (b)(6), to the extent the three petitioners allege misconduct by an adverse party, their motion is untimely under Fed. R. Civ. P. 60(b)(3):

> [T]he court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud
>
> (. . .), misrepresentation, or other misconduct of an adverse party. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) *not more than one year* after the judgment, order, or proceeding was taken.

(Emphasis added.) Here, petitioners' motion is obviously made more than one year after the final judgment in 1979. Further, they made it more than one year after they knew of the basis for

the motion. Papers filed with the three petitioners' original brief in the subproceeding below show that they knew the basis for their motion since at least June of 1992. Yet they delayed their original filing until just before Thanksgiving Day 1993. The three petitioners may not avoid the Rule 60(b)(3) time bar by disguising their motion as one under 60(b)(6). *Liljeberg*, 486 U.S. at 863 n. 11.

Even under Rule 60(b)(6), which requires only that the motion be "made within a reasonable time," the three petitioners' request was untimely.

V.

THE ALLEGED BASIS FOR PETITIONERS' MOTION BELOW, IF TRUE, IS HARMLESS ERROR UNDER FED. R. CIV. P. 61.

Finally, petitioners' arguments, even if assumed to be true, are for naught. They have received "substantial justice" and thus their motion is barred by Fed. R. Civ. P. 61.

Petitioners allege that the trial judge *may* have been mentally impaired. Assuming, *arguendo*, that there was some impairment at the time the judgment was signed and entered, the signing would be harmless error under Fed. R. Civ. P. 61. That rule provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error

> or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.

Thus, an alleged error is to be disregarded if it does not "affect the substantial rights of the parties." *Id.* Further, refusal to take the extraordinary step of "disturbing" a final judgment is mandated unless such refusal ". . . appears to the court inconsistent with substantial justice." *Id.*

The burden of demonstrating reversible error is on the party asserting error, and a showing of denial of substantial justice is required. *Hygh v. Jacobs*, 961 F.2d 359 (2nd Cir. 1992).

Here, the alleged error does not affect the substantial rights of the petitioners. The final independent decision of the Ninth Circuit determined those. As we have seen, the Ninth Circuit independently determined the correctness of the result, based on a record which has not been impeached nor challenged. Where substantial rights are not affected, no actionable harm occurs. *Moran v. H.W.S. Lumber Co.*, 538 F.2d 238 (9th Cir. 1976) (error in improperly admitting some evidence was harmless in light of other overwhelming evidence). *Eckis v. Graver Tank and Mfg. Co.*, 289 F.2d 335 (9th Cir. 1961) (improper admission of evidence which is merely cumulative of matters shown by admissible evidence is harmless).

Further, refusal to disturb the ruling is not inconsistent with substantial justice. Petitioners presented their case to four judicial entities; the magistrate sitting as a special master, the trial judge, the Court of Appeals, and the United States Supreme Court.[5] In addition, the Chief Judge of the District Court determined that the trial judge was capable of rendering a decision. A complete and full opportunity to develop a record

5. The Supreme Court refused to grant certiorari and did not review the matter. 454 U.S. 1143 (1982).

was supplied and utilized by them. They have alleged no deficiencies in the development of that record. It is difficult to imagine a more thorough and fair process than that received by petitioners.

Petitioners thus have not met their burden. Rather, they allege that there *might* have been error at the time the trial judge signed the final trial court findings. Given the independent consideration of the matter by other judicial persons, including a definitive ruling by the Court of Appeals, the signing of findings by a disabled judge, would be at most, harmless error. Simply put, the Ninth Circuit independently determined and confirmed the merits on a unimpeached record. The trial judge's alleged incapacity is essentially irrelevant. This is not to minimize the role of the district court judge in litigation. Where, however, as here, there is no error in the development of the record, the court's decision substantiates that of a special master, and the Court of Appeals independently reviews the record and makes determinations, the trial judge's role is less critical.

CONCLUSION

The Snohomish, Steilacoom, and Duwamish petitioners have not shown extraordinary circumstances that would justify reopening the earlier judgment in *United States v. Washington*, under Fed. R. Civ. P. 60. Nor have they met their burden of demonstrating reversible error under Fed. R. Civ. P. 61. In fact, they received substantial due process in their case.

- Federal Magistrate Judge Cooper held fact-finding hearings and issued a report adverse to their position. Petitioners have alleged no error in Judge Cooper's decision nor in that process.

- A trial *de novo* was held before the district court, including substantial additional exhibits and live

testimony. Petitioners have alleged no errors in the development of the trial record.

- Chief Judge McGovern of the district court then determined that it was in the best interest of justice that Judge Boldt complete the case. Petitioners have alleged no error in Judge McGovern's decision.

- The Ninth Circuit reviewed the case and independently confirmed the result. Petitioners have alleged no errors in that process.

All that the petitioners claim is that the trial judge *might* have been incapacitated at the time the final findings in this case at the district court level were signed. This is an insufficient basis on which to disturb a final judgment.

The petitioners' motion below ignored the judgment and determination of the federal magistrate who originally heard the case, sullied the memory of the distinguished jurist, now deceased, who heard the case, denigrated the judgment of the Chief Judge who allowed the district judge to complete work on the case, and disregarded the judgment of the Court of Appeals which independently determined that the correct result had been reached.

The public interest in the finality of judgments and in the integrity of the judicial process, as well as the rights of the parties in this case, outweigh any interests of the petitioners. Petitioners' request here is particularly offensive where they seek to engage in a fishing expedition into the health and mental capacity of a deceased jurist. Their untimely and inadequately supported motion for relief from judgment was properly denied by the district court and the Ninth Circuit properly affirmed it. Those rulings should be left undisturbed. Certiorari should be denied.

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No. 96-1607

In The

Supreme Court of the United States

October Term, 1996

DUWAMISH INDIAN TRIBE, SNOHOMISH INDIAN TRIBE and STEILACOOM INDIAN TRIBE,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners, the Duwamish, Snohomish, and Steilacoom Indian Tribes (the "Three Tribes"), respectfully submit this reply brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Petition").

INTRODUCTION

In their Petition, the Three Tribes offered compelling reasons for the issuance of a writ of certiorari in this case.[1] Two briefs in opposition have been filed, one by the United States and one by certain tribal respondents.[2] As discussed below, neither does anything to diminish the importance of the question presented by the Three Tribes.

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE BRIEF IN OPPOSITION BY THE UNITED STATES MISCHARACTERIZES THE DECISION BELOW IN AN EFFORT TO AVOID REVIEW BY THIS COURT.

The Three Tribes have asked the Court to decide whether a

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1. Among other things, the Three Tribes demonstrated that the opinion below defies this Court's important prior rulings on a litigant's fundamental due process right to a fair trial (Pet. 11-14), conflicts with this Court's prior rulings on the importance of Rule 60(b)(6) of the Federal Rules of Civil Procedure as a means of effectuating that right (*Id.* at 14-16), and disregards this Court's prior rulings on the crucial role played by a district court judge as a trier of fact (*Id.* at 16-18).

2. A brief in opposition was filed collectively by the Tulalip Tribes, Muckelshoot Tribe, Nisqually Tribe, Puyallup Tribe and Squaxin Island Tribe (hereinafter "Tribal Respondents").

civil litigant is entitled to post-judgment discovery[3] and other relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure when it learns, after a judgment has been entered, that the trial judge may well have been mentally incompetent at the time he issued his opinion. Pet. i. In response, the United States asserts that "the decision below does not implicate important due process concerns warranting review by this Court." U.S. Opp. 10. The United States is mistaken.

The panel majority proffered two reasons for denying the Three Tribes' Rule 60(b)(6) motion. First, it stated that "This is not one of those rare cases where 'extraordinary circumstances' warrant vacating an 'erroneous judgment.' " Pet. App. 11a. Second, it ruled that the Three Tribes suffered no harm because, regardless of whether the district court judge was mentally competent at the time he rendered his opinion, a magistrate judge and the court of appeals "closely examined the case and reached the same conclusion" as the judge. To conclude, as does the United States, that this reasoning "does not present any conflict with the due process right that petitioners derive from this Court's jurisprudence," U.S. Opp. 11, is incorrect.

With regard to the existence of "extraordinary circumstances," the panel majority raised the bar so high that no one can enforce the right to a competent trier of fact. To the extent the panel majority stated that the Three Tribes have not set forth facts sufficient to justify further discovery, it is clear that no party can. Pet. App. 17a-18a ("If disability were a proper

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3. Contrary to the assertions of the United States (U.S. Opp. 6, 8), the Three Tribes do not seek to vacate the judgment at this time. Instead, the Three Tribes have made clear to the district court (Pet. App. 24a), the court of appeals (Pet. App. 11a), and this Court (Pet. 11), that they seek to take *discovery* to determine if there is further factual support for their due process claim. The Three Tribes will only seek to vacate the judgment if subsequent discovery reveals a sufficient factual basis to justify such relief.

basis for setting aside the judgment, *I can see no basis for denying the [Three] Tribes the right to seek discovery* from the judge's doctors to confirm or refute speculation about the judge's competence.") (Kozinski, J., concurring) (emphasis added). By denying the Three Tribes the ability to discover facts relating to a judge's competence when there is substantial evidence putting that question in issue, the panel majority effectively denied the existence of any right under the due process clause, and its attempt to reserve the question for a later day, Pet. App. 12a, is meaningless. As a result, the question presented is before the Court.

Likewise, with regard to the fact the magistrate judge and the court of appeals reached the same conclusion as the judge, the majority did not, as the United States suggests, assume the right to a competent trier of fact; it has refused to recognize it. Here, the district court judge did not accept the magistrate's report at a time when he was competent, and he ordered a *de novo* evidentiary hearing. Thus, the magistrate's report cannot be viewed as a substitute for review by a competent judge. Review by the court of appeals, especially when the standard is "clearly erroneous," is no substitute either. This Court has ruled that the right to an unbiased judge is not lost in situations in which the judge's opinion is affirmed by a court of appeals. *See Bracy v. Gramley*, No. 96-6133, __ U.S. __, 1997 WL 303400, *4 n. 6, (June 9, 1997); *e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The same should be true in cases involving questions of judicial competence.

The case at issue resembles in many ways the recently decided *Bracy* case. There, the court below denied the petitioner's motion for post-judgment discovery into the possibility of bias on the part of the judge, finding his due process claim "speculative" and concluding that he had failed to show "good cause" justifying discovery. *Bracy v. Gramley*, 81 F.3d 684, 690 (7th Cir. 1996).

The court below also took comfort in the fact that the state supreme court "did not find any errors in the rulings." *Id.* Those findings were not sufficient to obscure the importance of the due process question of the right to a fair judge. The efforts of the United States here should be similarly unavailing.

II.

THE BRIEF IN OPPOSITION OF THE TRIBAL RESPONDENTS FAILS TO DIMINISH THE IMPORTANCE OF THE QUESTION PRESENTED BY THE THREE TRIBES.

The brief in opposition submitted by the Tribal respondents largely focuses on the merits of the case, as opposed to the importance of the question presented. To the limited extent they do focus on the importance of the question presented for review, they offer nothing more than what the United States did in its brief. For the reasons discussed above, they fail to persuade.

CONCLUSION

At stake here are the treaty rights of the Three Tribes and the prospect that they will be forever barred from exercising those rights by a judge who may have been mentally incompetent at the time he rendered his judgment. This case squarely raises the question of the right to a competent trier of fact. For the reasons set forth above and in their Petition, the Three Tribes respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted

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